TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 181

THE F. W. FITCH COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 21, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 12,749

CIVIL.

UNITED STATES OF AMERICA, APPELLANT,

vs.

THE F. W. FITCH COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED NOVEMBER 2, 1943.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit at the March Term, 1944, of said Court, before the Honorable John B. Sanborn, the Honorable Seth Thomas and the Honorable Walter G. Riddick, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the 2nd day of November, A. D., 1943, a transcript of record pursuant to an appeal taken from the District Court of the United States for the Southern District of Iowa, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the United States of America was Appellant and The F. W. Fitch Company, a Corporation, was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

[fol. 1] Pleas and Proceedings before the Honorable Chas. A. Dewey, Judge of the District Court of the United States for the Southern District of Iowa, in a certain cause lately pending in the Central Division of said Court, wherein the United States of America is Appellant, and The F. W. Fitch Company, (a Corporation) is Appellee.

Be It Remembered, That on the 25th day of May, A.D. 1942, there was filed in the District Court of the United States for the Southern District of Iowa, Central Division, a Complaint in the case of F. W. Fitch Company, a corporation, Plaintiff, vs. United States of America, Defendant, which case was numbered 191 Civil Action, Central Division, said complaint being in words and figures as follows:

[fol. 2] Complaint

In the United States District Court for the Southern District of Iowa, Central Division

The F. W. Fitch Company, (a Corporation) Plaintiff
No. 191 vs. Civil
United States of America, Defendant

The F. W. Fitch Company brings this, its complaint against the United States of America, pursuant to the provisions of Section 24 (Twentieth) and Section 145, Title 28 (Judicial Code) of the Code of the United States, and for cause of action alleges as follows:

I

The F. W. Fitch Company, plaintiff herein, is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Iowa, having its principal place of business in the City of Des Moines, Polk County, Iowa.

II

This action is brought to recover Federal manufacturers' excise taxes and interest thereon erroneously and illegally collected from the plaintiff by Charles D. Huston,

Collector of Internal Revenue, for the collection District of Iowa. Said Charles D. Huston at the time he collected said Federal excise taxes was a citizen and resident of Des Moines, Polk County, Iowa and was at that time duly appointed, qualified and acting Collector of Internal Revenue for said District. However, at the time of commencement of these proceedings he is no longer in office.

III

This Court has jurisdiction of the cause of action stated in this complaint in that said cause of action arises under [fol. 3] the laws of the United States, to-wit; the Revenue Act of 1932 (C. 209, 47 Stat. 169). Further this court has concurrent jurisdiction with the United States Court of Claims under Section 24 (Twentieth) of Title 28 of the Code of the United States.

IV

Plaintiff's claim for recovery of Federal excise taxes and interest thereon erroneously and illegally collected from plaintiff, as aforesaid, is based upon the following facts:

(1) During the months commencing October 1, 1936 to July 1, 1939, plaintiff was engaged in the manufacture and sale of toilet preparations which were subject to a manufacturers' excise tax under the provisions of Section 603 of the Revenue Act of 1932, equivalent in amount to ten percent (10%) of the price for which said articles were sold. Included among such articles were Fitch's Ideal Hair Tonic, various massage, cleansing and toilet creams and other kindred items. During the months commencing October 1, 1936 to July 1, 1938, plaintiff was also engaged in the manufacture of articles which were subject to a manufacturers' excise tax under the provisions of Section 603 of the Revenue Act of 1932, equivalent in amount to 5% of the price for which said articles were sold. Such articles, subject to a tax of 5%, consisted of dentrifices, tooth paste and toilet soaps, the principal item being known as "Fitch's Dandruff Remover Shampoo".

(2) During the months commencing October 1, 1936 to July 1, 1939 plaintiff sold said articles subject to an excise tax at the rate of 10% for a total sales price of $2,204,000.-80. Said sales price included all charges for all coverings and containers of whatever nature and all charges inci-

dent to placing the said articles in condition packed ready for shipment, but excluded the amount of tax imposed by Title IV of the Revenue Act of 1932. During the months commencing October 1, 1936 to July 1, 1938 plaintiff sold said above referred to articles, which were subject to an excise tax at the rate of 5% for a total sales price of $1,897,531.80. As in the case of articles subject to the excise tax at the rate of 10%, said sales price included [fol. 4] all charges for coverings, containers and all charges incident to placing the articles in condition packed ready for shipment, but excluded the amount of the tax.

(3) Said articles, [aforsaid], were sold through arm's length transactions to wholesalers and jobbers.

(4) For each of the months from October 1, 1936 to July 1, 1939 plaintiff filed with the Collector of Internal Revenue for the District of Iowa, due and proper returns known as Treasury Department Form 728, on which were disclosed a manufacturers' excise tax liability under the provisions of Section 603 of the Revenue Act of 1932, based upon its sales of said articles during said months. The aggregate sales price for articles subject to the 10% tax amounted, as aforesaid, to $2,204,000.80 on which a total tax in the amount of $220,400.08 was returned and paid. The aggregate amount of the sales price of articles subject to the excise tax at the rate of 5% which was returned amounted to $1,897,531.80 upon which a total tax in the sum of $94,876.59 was returned and paid.

(5) During the period commencing October 1, 1936 to and including June 30, 1939, the plaintiff paid or incurred liability for salesmen's commissions, radio advertising, other advertising and other selling costs and expenses in respect of sales of the aforesaid articles upon which a manufacturers' excise tax, at the rate of 10%, was returned and paid, in the amount of $846,262.78 in addition to the costs and expenses for freight and discount.

During the period extending from October 1, 1936 to and including June 30, 1938 the plaintiff paid or incurred liability for salesmen's commissions, radio advertising, other advertising and other selling costs and expenses in respect of sales on which a 5% manufacturers' excise tax was returned and paid in the amount of $729,235.44 in

addition to the said costs and expenses for freight and discount.

(6) In respect to articles sold by the plaintiff to barber and beauty supply dealers, syndicate and chain stores and customers purchasing a line of cosmetics known as "Beauty by Fitch", the plaintiff did not add the manu- [fol. 5] facturers' excise tax to the selling price, but absorbed said tax. In respect to articles sold by the plaintiff to drug jobbers and wholesalers, and in respect to sale of Special Label merchandise, the plaintiff added the tax to the selling price and no refund of manufacturers' excise tax paid on such sales is claimed.

(7) During the period extending from October 1, 1936 to and including June 30, 1939, plaintiff manufactured and sold articles on which the 10% excise tax was levied and paid to barber and beauty supply dealers, syndicate and chain stores and customers purchasing the line of cosmetics known as "Beauty by Fitch" in the amount of $1,298,181.60. The tax imposed on such sales was the sum of $129,818.16, no part of which was added to or included in the selling price.

During the period extending from October 1, 1936 to and including June 30, 1938 plaintiff manufactured and sold articles on which the 5% excise tax was imposed to barber and beauty supply dealers, syndicate and chain stores and customers purchasing the line of cosmetics known as "Beauty by Fitch" in the amount of $566,876.40. The tax imposed on such sales was the sum of $28,343.82 no part of which was passed on to the purchaser nor included in the selling price.

(8) With respect to articles manufactured and sold by the plaintiff to barber and beauty supply dealers, syndicate and chain stores and customers purchasing the line of cosmetics known as "Beauty by Fitch" and upon which the 10% excise tax was levied and paid, no part of same being passed on to the purchaser, the plaintiff expended the sum of $572,270.12 for advertising and selling expense.

With respect to articles manufactured and sold by the plaintiff to barber and beauty supply dealers, syndicate and chain stores and customers purchasing the line of cosmetics known as "Beauty by Fitch" and upon which

the 5% excise tax was levied and paid, no part of same being passed on to the purchaser, the plaintiff expended the sum of $253,946.65 for advertising and selling expense.

(9) In its monthly excise tax returns, the plaintiff did not deduct from the selling price upon which the tax was [fol. 6] levied and paid, the amounts expended as set out in the preceding paragraph for advertising and selling expense. By reason of the plaintiff's failure to deduct advertising and selling expense from the selling price upon which the tax was paid, the plaintiff overpaid manufacturer's excise taxes on items taxable at the rate of 10% during the period extending from October 1, 1936 to and including June 30, 1939, in the sum of $57,226.98.

By reason of the plaintiff's failure to deduct advertising and selling expense from the selling price upon which the tax was paid, the plaintiff overpaid manufacturers' excise taxes on items taxable at the rate of 5% during the period extending from October 1, 1936 to and including June 30, 1938 in the sum of $12,692.33.

V

On or about November 11, 1936, the plaintiff duly filed with the Collector of Internal Revenue for the District of Iowa its monthly manufacturers' excise tax return under Section 603 for the month of October 1936. Each month thereafter the plaintiff duly filed its return during the periods hereinbefore mentioned as required under said Section. On the 8th day of October 1940 plaintiff duly filed a claim for refund of manufacturers' excise taxes covering the periods hereinbefore referred to, claiming refund of said taxes in the amount of $67,666.39 by reason of plaintiff's failure to deduct advertising and selling expenses in computing the tax due. A copy of said claim for refund is hereto attached, marked Exhibit "A" and hereby made a part hereof.

VI

On June 12, 1941 the Commissioner of Internal Revenue addressed a letter, by registered mail, to plaintiff advising it that its claim for refund was rejected in full. A copy of said letter of rejection is hereto attached, marked Exhibit "B" and made a part hereof.

VII

The rejection of said claim for refund by the Commissioner of Internal Revenue was erroneous and the collec- [fol. 7] tion of the said taxes was erroneous and illegal in that the Commissioner of Internal Revenue failed and neglected to reduce the selling price of the articles upon which the tax was based by the amount expended for advertising and selling costs incurred by said plaintiff, as hereinbefore set out.

Wherefore, plaintiff demands judgment against defendant in the sum of Sixty-nine Thousand, Nine Hundred Nineteen Dollars and thirty-one cents ($69,919.31), together with interest as provided by law and for the costs and disbursements of this action.

THE F. W. FITCH COMPANY
By F. W. Fitch, President.

Arnold F. Schaetzle
203 Hubbell Building,
Des Moines, Iowa.

Richard E. Williams
203 Hubbell Building,
Des Moines, Iowa.
Attorneys for Plaintiff.

State of Iowa
County of Polk—ss.:

F. W. Fitch, being first duly sworn, on oath, deposes and says that he is president of Plaintiff; that he is duly authorized by Plaintiff to make this affidavit on its behalf; that he has read the above and foregoing Complaint and knows the contents thereof, and that the same is true, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

F. W. FITCH

Subscribed and sworn to before me this 13th day of May, 1942.

(Seal) RUTH LITTELL,
Notary Public.

Form 843
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
(Revised April 1940)

EXHIBIT "A"

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

COLLECTOR'S STAMP
(Date received)

- ☐ REFUND OF TAX ILLEGALLY COLLECTED.
- ☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.
- ☐ ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

STATE OF IOWA
COUNTY OF POLK } ss:

TYPE OR PRINT

Name of taxpayer or purchaser of stamps THE F. W. FITCH COMPANY

Business address 15th & Walnut Sts., (Street) Des Moines (City) Iowa (State)

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Des Moines, Iowa
2. Period (if for income tax, make separate form for each taxable year) from Oct. 1, 1936, to July 1, 1940
3. Character of assessment or tax Manufacturers' Excise Tax
4. Amount of assessment, $ 67,666.39; dates of payment Monthly payments
5. Date stamps were purchased from the Government
6. Amount to be refunded $ 67,666.39
7. Amount to be abated (not applicable to income or estate taxes) $
8. The time within which this claim may be legally filed expires, under Section 3313 of the Revenue Act of 1932, on Oct. 11, 1940

The deponent verily believes that this claim should be allowed for the following reasons:

Statement attached

☐ REFUND OF TAX ILLEGALLY COLLECTED.

☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.

☐ ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

STATE OF IOWA
} ss:
COUNTY OF POLK

TYPE OR PRINT

Name of taxpayer or purchaser of stamps THE F. W. FITCH COMPANY

Business address 15th & Walnut Sts., (Street) Des Moines (City) Iowa (State)

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Des Moines, Iowa
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3. Character of assessment or tax Manufacturers' Excise Tax
4. Amount of assessment, $ 67,666.39; dates of payment Monthly payments
5. Date stamps were purchased from the Government
6. Amount to be refunded $ 67,666.39
7. Amount to be abated (not applicable to income or estate taxes) $
8. The time within which this claim may be legally filed expires, under Section 3313 of the Revenue Act of 1932, on Oct. 11, 1940

The deponent verily believes that this claim should be allowed for the following reasons:

Statement attached

(Attach letter-size sheets if space is not sufficient)

Sworn to and subscribed before me this 5TH day of October 1940

Signed THE F. W. FITCH COMPANY

By

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax: (Show, in the ninth column, by symbols "Pd.," "Ab.," or "Cr.," the nature of each entry in the eighth column.)

Claim No. _____

Class of tax and taxable year or period	ASSESSMENT LIST			ACCOUNT NO. OR		Amount assessed		PAID, ABATED, OR CREDITED			Pd. Ab. Cr.
	List	Month	Year	Page	Line			Date	Amount		
						$			$		
					Total,	$		Total,	$		

Claim No. _____

I certify that the records of this office show the following facts as to the purchase of stamps:

TO WHOM SOLD OR ISSUED	Kind	Number	Denomination	Date of sale or issue	Amount		If special tax stamp, state:	
							Serial number	Period commencing—
					$			

_____
Collector of Internal Revenue. (District)

Claim examined by—

Claim approved by—

Chief of Division.

COMMITTEE ON CLAIMS

Amount claimed... $_____ _____

Amount allowed... $_____ _____

Amount rejected... $_____ _____

INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof

Claim No.												
					Total,	$			Total,	$		

I certify that the records of this office show the following facts as to the purchase of stamps:

To Whom Sold or Issued	Kind	Number	Denomination	Date of sale or issue	Amount		If special tax stamp, state: Serial number	If special tax stamp, state: Period commencing—
					$			

Collector of Internal Revenue. (District)

Claim examined by—
Claim approved by—
Chief of Division.

COMMITTEE ON CLAIMS

Amount claimed... $_____

Amount allowed... $_____

Amount rejected... $_____

INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

16—16504

[fol. 9] The F. W. Fitch Company, of Des Moines, Iowa under and by virtue of the manufacturers excise tax law, effective date of which was June 1, 1932, has wrongfully been assessed and has paid excise taxes in the amount of $67,666.39. In making out the monthly returns for the manufacturers excise tax The F. W. Fitch Company did not deduct during the period extending from October 1, 1936 to and including June 30, 1940, the amount of money spent on advertising and sales expenditures. According to the terms of the Revenue Act, it is proper and lawful to deduct from the sale price the amount of money spent on advertising and sales.

From October 1, 1936 to and including June 30, 1940, The F. W. Fitch Company has spent $252,561.60 in advertising and selling items on which a 5% manufacturers excise tax was levied and collected. From October 1, 1936 to and including June 30, 1940 The F. W. Fitch Company has spent $550,383.10 in advertising and selling items on which a manufacturers excise tax of 10% was levied and collected. In other words, The F. W. Fitch Company has wrongfully and illegally been assessed and has paid a 5% tax on $252,561.60 and The F. W. Fitch Company has wrongfully been assessed and has paid a 10% tax on $550,383.10. 5% on the former amount is $12,628.08 and 10% of the second amount is $55,038.31. Thus, The F. W. Fitch Company has wrongfully been assessed and has paid $67,666.39 in manufacturers excise taxes during the above described period that it would not have been necessary for The F. W. Fitch Company to pay.

Furthermore, the amount of tax which The F. W. Fitch Company now seeks to have refunded has been absorbed by The F. W. Fitch Company and has not been passed on to its customers. For these reasons The F. W. Fitch Company respectfully submits that it is entitled to a refund of manufacturers excise taxes in the amount of $67,666.39.

[fol. 10] Exhibit "B"

June 12, 1941.

MT:ST:BMH
Cl. S-88870

The F. W. Fitch Company,
15th and Walnut Streets,
Des Moines, Iowa.

Gentlemen:

Reference is made to your claim for refund in the amount of $67,666.39 representing tax paid by you for the period from October 1936 through June 1940 with respect to sales of toilet preparations.

Your claim was originally filed to recover amounts alleged to have been paid with respect to advertising and selling expenses. Mr. Schaetzle's letter of April 28, 1941, stated that you wish to withdraw your claim for the period from July 1939 through June 1940, inasmuch as the allowable deductions had been claimed for that period at the time of the filing of your returns. Mr. Schaetzle did not, however, withdraw that part of the claim covering the period from October 1936 through June 29, 1939, and, notwithstanding office letter of December 30, 1940, which advised that the Bureau holds advertising and selling expense not to have been allowable as deductions prior to June 30, 1939, requested that a conference be arranged to be held on May 27, 1941.

Office letter of May 12, 1941, reiterated the Bureau's position with respect to the deductibility of advertising and selling expenses prior to June 30, 1939, but stated that the time suggested by Mr. Schaetzle had been reserved for a conference if, regardless of the position of the Bureau, one was desired.

Neither you nor your representative appeared for the conference on May 27, 1941, and it is assumed that you do not care to pursue the matter further. Your claim, is therefore, rejected in full.

Regardless of the foregoing, no allowance could be made with respect to your claim in view of section 621(d) of the Revenue Act of 1932 and section 3443(d) of the

Internal Revenue Code since, although you have stated that you did not collect the tax from your customers or include it in your selling price, you have not procuded evidence to substantiate your statement.

Respectfully,
GUY T. HELVERING
Commissioner
By D. S. Bliss
Deputy Commissioner

cc-Des Moines, Iowa
cc-Mr. Arnold P. Schaetzle
Hubbell Building
Des Moines, Iowa

[fol. 11] (Summons and Marshal's Return of Service.)

Filed in U. S. District Court on May 26, 1942.

To the above named Defendant:

You are hereby summoned and required to serve upon Richard E. Williams and Arnold F. Schaetzle, plaintiff's attorneys, whose address 203 Hubbell Bldg., Des Moines, Iowa, an answer to the complaint which is herewith served upon you, within sixty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

N. F. REED,
Clerk of Court.

Date May 25th, 1942.

By Justine Hummel,
Deputy Clerk.
(Seal)

Return on Service of Writ.

I hereby certify and return, that on the 25th day of May, 1942, I received the within summons and on the same date, at Des Moines, Iowa, I duly served United States of America, by offering to read the original writ to Cloid I. Level, Asst. U. S. Attorney, Southern District of Iowa,

which reading was waived, and delivered to him a true copy of this writ together with a copy of the Bill of Complaint.

Marshal's Fees.	
Travel 1	$ .06
Service 1	2.00
	$2.06

JAMES J. GILLESPIE,
U. S. Marshal.
By Virgil Lekin,
Deputy United States Marshal.

[fol. 12] Answer

Filed in U. S. District Court November 12, 1942.

The defendant, by its attorney, Maurice F. Donegan, United States Attorney for the Southern District of Iowa, for its answer to the complaint:

1. Admits the allegations contained in paragraphs I, V, and VI of the complaint.

2. Denies that the excise taxes and interest involved in this action were erroneously and illegally collected, but admits the other allegations contained in paragraph II of the complaint.

3. Denies the allegations contained in paragraph III of the complaint.

4. Admits that plaintiff was engaged in the manufacture and sale of toilet preparations subject to manufacturers' excise tax under Section 603 of the Revenue Act of 1932 during the months of October, 1936, to June, 1939, inclusive, and admits that due and proper excise tax returns were filed by the plaintiff with the Collector of Internal Revenue for the District of Iowa for the said period, but denies that the excise taxes claimed in this action to have been erroneously and illegally collected from the plaintiff were not included in the sales prices of plaintiff's [fol. 13] articles with respect to which they were imposed, and, as to each and every other allegation contained in subparagraphs (1) to (9), inclusive, of paragraph IV, defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of such allegations.

5. Denies that plaintiff overpaid manufacturers' excise taxes in the amounts alleged in paragraph IV, subparagraph (9), of the complaint.

6. Denies the allegations contained in paragraph VII of the complaint.

First Special Defense

7. Alleges that the complaint fails to state a claim against defendant upon which relief can be granted.

Second Special Defense

8. Asserts that the Court lacks jurisdiction of this action because plaintiff's claim for refund for the taxable period in suit is insufficient.

Third Special Defense

9. Asserts that this action cannot be maintained against the defendant because of plaintiff's failure to comply with the provisions of Section 621 (d) of the Revenue Act of 1932 and Section 316.94 of Regulations 46, promulgated thereunder.

Wherefore, defendant demands judgment dismissing the complaint, together with the costs and disbursements of the action.

MAURICE F. DONEGAN
United States Attorney

WILLIAM R. SHERIDAN
Assistant United States Attorney

[fol. 14] Memorandum Opinion.

Filed in U. S. District Court June 19, 1943.

The above entitled action came on for hearing on its merits at Des Moines, Iowa, on the 24th and 25th days of May, 1943, evidence was introduced, arguments had, and the suit fully submitted to the court for decision.

In the action the plaintiff seeks to recover from the United States of America certain manufacturers' excise taxes alleged to have been illegally and wrongfully paid to the Collector of Internal Revenue commencing with October 1936 and ending with June 1939.

Commencing with October 1936 and ending with June 1939 plaintiff filed manufacturers' excise tax returns with respect to the toiletries and cosmetics manufactured and

sold by it, reporting thereon tax liabilities in the aggregate amount of $319,170.48, which was assessed and paid on the dates of the filing of said monthly returns. Some of the articles so manufactured and sold by the plaintiff were taxable under the applicable statutes at the rate of 10 per cent. while others were taxable at the rate of 5 per cent.

On October 8, 1940, plaintiff filed a claim for a refund of $67,666.39, on the excise taxes paid for the period from [fol. 15] Oct. 1, 1936, to June 30, 1940. The claim was based on the ground that in making out its monthly returns plaintiff erroneously failed to deduct from the selling price of its toilet articles the amount it spent for selling and advertising, and therefore there had been wrongfully assessed and paid by it the above excise taxes.

In its claim so filed the taxpayer stated that the amount of the tax sought to be refunded was absorbed by plaintiff and had not been passed on to its customers.

On the trial the taxpayer introduced evidence establishing that it did pay the tax as aforesaid and that during said period it had spent a large amount in the cost of selling and advertising of its products and that a large proportion of its sales was made to barbers, beauty supply dealers, chain stores and customers purchasing a line of [cosmeteis] known as "Beauty by Fitch" and that all such sales were made at arm's length; that the plaintiff on all of such sales did not add the manufacturer's excise tax to the selling price but absorbed and bore the burden of said tax. However, in respect to articles sold by the plaintiff to drug jobbers and wholesalers and in respect to sales of special labeled merchandise the plaintiff added the tax to the selling price and no refund of the manufacturers' excise tax paid on such sales is claimed.

Also, that a proper and fair method of computing the amount of the credit for the expense of selling and advertising on the manufacturing cost of those articles upon which the refund is claimed is the percentage that such costs bear to the cost of the entire output and sales of the taxpayer's manufactured products covered by the advertising and selling.

The Government did not offer any evidence to refute the facts established by the taxpayer as above. It claims, however, that the evidence taken as a whole fails to establish that the taxpayer absorbed the tax on those products for which it claims it is entitled to a refund; but I find that [fol. 16] the taxpayer has fairly established that it did so absorb the tax; reported and paid the same and is entitled to a refund therefor. Campana Corporation v. Harrison, 114 F. 2d 400.

The Government relies principally in addition to challenging the decision of the Campana case, upon its affirmative defenses set out in its answer:

1st, that the complaint fails to state a claim against the defendant upon which relief could be granted.

2nd, that the court lacks jurisdiction of the action because plaintiff's claim for refund for the tax period in suit is insufficient. And

3d, that the action cannot be maintained against the defendant because of plaintiff's failure to comply with the provisions of Sec. 621 (d) of the Revenue Act of 1932, and Section 316.94 of Regulations No. 46 promulgated thereunder.

The defense that the complaint fails to set forth a claim against the defendant is the same, as I understand it, as the other defenses which have to do with the jurisdiction of the court. It is the contention of the Government that the claim filed by the taxpayer before the Commissioner only states in general terms that—

"the amount of tax which the F. W. Fitch Company seeks to have refunded has been absorbed by the F. W. Fitch Company and has not been passed on to its customers."

That this allegation is not sufficient to give the Commissioner authority to refund a claim, but that additional evidence must be presented to the Commissioner to establish such conclusion on the part of the taxpayer, as required by certain statutes and regulations. This statute is:

Section 621 (d) of the 1932 Revenue Act:

"No overpayment of tax under this Title shall be credited or refunded . . . in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

(1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of the tax from the vendee, * * *"

[fol. 17] And Article 71 of Treasury Regulations No. 46, (now 316.94, 1940 edition Regulations No. 46), reading as follows:

"Credits and Refunds. * * *

If any person overpays the tax due with one monthly return, he may either file a claim for refund on Form 843 or take credit for the overpayment against the tax due with any subsequent monthly return. In all cases . . . where a person overpays tax, no claim or refund shall be allowed, whether in pursuance of a court decision or otherwise, unless the taxpayer files a sworn statement explaining satisfactorily the reason for claiming the credit or refund and establishing (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of the tax from the vendee . . ."

The taxpayer as stated above in his claim filed for the refund only stated generally that he had absorbed the tax and did not establish such general allegation by any evidence; and had the Commissioner passed upon plaintiff's claim on its merits and denied the same it may be that this defense of the Government would be well taken. Lee Wilson & Co. v. Commissioner, 11 F. 2d 313, 317 and 123 F. 2d 232; Landrum v. Commissioner, 122 F. 2d 857; Weiss v. United States, F 2d (CCA 7, opinion dated May 17, 1943, reported in Prentice-Hall Tax Service p. 62852, affirming decision by Judge Holly).

However, there is considerable history in connection with the filing of the claim by the taxpayer and its disposition by the commissioner. The claim as originally filed asked for a refund from October 1, 1936, to June 30, 1940. The

claim was filed October 8, 1940, and acknowledged by the Commissioner on December 30, 1940, in a letter which stated, among other things, as follows:

"You are advised that the provisions of section 3 of the Revenue Act of 1939 . . . are not retroactive in their effect. Selling and advertising expenses incurred prior to July 1, 1939 do not therefore represent allowable deductions from taxable sales and no consideration may be given to your claim with respect to any tax paid for a period prior to that date."

And—

"Your statement is noted that you did not pass the tax on to your customers but [sbsorbed] it. The mere statement does not constitute a basis for a finding by the Commissioner that you have established your compliance with section 621 (d) of the Revenue Act of 1932 . . .

[fol. 18] You are therefore requested to forward to this office any evidence which in your opinion will substantiate your contention on this point."

After some correspondence in which the Commissioner asked for further evidence, the taxpayer filed with the Commissioner on April 29, 1941, a paper designated as a "Brief", with supporting schedules and data in connection with the refund claim. This statement of the taxpayer sets forth detailed information as to each month of sales to the several customers, as above stated, showing the percentage of such sales to the total net sales, the net sales, freight deducted, taxable sales reported, selling and advertising expenses not deducted, corrected taxable sales, corrected tax, tax paid, and refund due. These statements are shown for each month and with a summary of the Corrected Tax, Tax Paid and a claim for Refund Due of $69,919.31.

In its argument to the Commissioner accompanying said brief the taxpayer, through its attorneys, after stating that it is relying upon the case of Campana Corporation v. Harrison, 114 F. 2d 400, makes the following statement:

"The claim for refund is based only upon sales made by the taxpayer to barber and beauty supply houses, syndi-

cate stores and sales of "Beauty by Fitch" merchandise. In the above fields the taxpayer absorbed the tax and charged its purchaser identically the same price for merchandise after the effective date of the Revenue Act of 1932, as it had charged previous to that date. On sales made by the taxpayer in the drug store field, the manufacturer's excise tax was passed on to the purchaser and no claim for refund is made on such sales.

If a conference is granted in connection with this matter there will be submitted at that time actual invoices showing that the tax was absorbed by the company in those sales markets wherein the refund is claimed."

To this communication the Commissioner on May 12, 1941, among other things, replied:

"Reference is also made to Mr. Schaetzle's letter of April 28, 1941, transmitting to this office a brief in support of your claim and requesting that a conference be arranged to be held at 10:00 a.m. on May 27, 1941. Mr. Schaetzle states that your claim, so far as it relates to the period subsequent to June 29, 1939, is withdrawn, being retained only for the purpose of claiming the advertising and selling expenses incurred prior to June 30, 1939.

[fol. 19] This being true, it does not appear that any benefit can be derived from the holding of a conference since as you were advised by office letter of December 30, 1940, the Bureau holds that advertising and selling expenses were not allowable prior to June 30, 1939.

In support of your contention for the deductions you cite the decision of the United States Circuit Court of Appeals for the Seventh Circuit, in the case of Campana Corporation v. Harrison. This office does not concede the correctness of the Campana decision and adheres to the position stated above. This position is fully supported by the decision of the United States Court of Claims rendered on April 7, 1941, in the case of The Ayer Company v. United States.

Although as stated above, it does not appear that any benefit could be derived from the holding of a conference, the hour of 10:00 a.m. on May 27, 1941, has been reserved

for the purpose of a conference if you wish to appear, notwithstanding the position of the Bureau."

On June 12, 1941, the Commissioner addressed a letter to the F. W. Fitch Company in which the Commissioner reiterated his statement that the Bureau holds that advertising and selling expenses are not allowable as deductions prior to June 30, 1939, and further stated—

"Neither you nor your representative appeared for the conference on May 27, 1941, and it is assumed that you do not care to pursue the matter further. Your claim is, therefore, rejected in full."

And after this, is the following—

"Regardless of the foregoing, no allowance could be made with respect to your claim in view of section 621 (d) of the Revenue Act of 1932 and section 3443 (d) of the Internal Revenue Code since, although you have stated that you did not collect the tax from your customers or include it in your selling price, you [jave] not produced evidence to substantiate your statement."

From the foregoing and other correspondence it is apparent that immediately upon the filing of the claim by the taxpayer the Commissioner took the position that he would not refund advertising and selling expenses as manufacturer's costs on any claim for refund of taxes prior to June 30, 1939; that any conference or hearing on the taxpayer's claim for refund prior to June 30, 1939, would be futile and ineffective, as the Bureau was committed to a refusal of such claims made prior to June 30, 1939; that it would adhere to the decision in the case of Ayer v. United States, 38 F. Supp. 284, and would not follow the Campana case, supra.

[fol. 20] Its position that additional evidence was necessary before the Commissioner would consider the merits, referred to the claim of the taxpayer for refund of the taxes paid subsequent to June 30, 1939, afterwards waived by the taxpayer.

The statement in the letter from the commissioner dated June 12, 1941, following the rejection of the claim in full, to the effect that the allowance could not be made in any

event because of the failure to file the additional evidence appears to be an afterthought and would not, in my opinion, affect the waiver of the filing of such evidence which the Commissioner had clearly indicated in his former communications.

It seems to me that on the entire record and considering these letters any by the refusal to consider proffered proof the Commissioner has waived any statutory requirements or its own regulations regarding the necessity of the filing of evidence establishing that the taxpayer had borne the burden of the tax. Tucker v. Alexander, 275 U. S. 228, 231; Bonwit Teller & Co. v. United States, 283 U. S. 258, 264; United States v. Memphis Cotton Oil Co., 228 U. S. 62, 71; United States v. Jefferson Electric Co., 291 U. S. 386; United States v. Garbutt Oil Co., 302 U. S. 528, 533; University Distributing Co. v. United States, 22 F. Supp. 794; Shotwell Mfg., Co. v. Harrison, 27 F. Supp. 422; Gottlieb v. Harrison, 27 F. Supp. 424; Con-Rod Exchange v. Henrickson, 27 F. Supp. 427; S. & R. Grinding & Machine Co. v. United States, 27 F. Supp. 429.

The case of Samara v. United States, 129 F. 2d 594, relied upon the Government is not in point as it involved a different statute and the question of waiver was not present.

In determining the question of whether or not advertising and selling expenses are proper deductions from manufacturer's costs, I feel that I am bound to follow the decision of a Circuit Court of Appeals rather than that of the Court of Claims.

The Government also contends by apt objections to the [fol. 21] evidence during the trial and in argument that the taxpayer was not entitled to introduce evidence different from that presented in its claim to the Commissioner.

The Government here again relies upon the Samara case, supra, but the court there was considering a statute which required all the evidence relied upon by the taxpayer to support its claim that it bore the entire burden of the tax to be filed with the commissioner, and decision by the commissioner was on the merits.

The general rule, as I understand it, is that the trial here is de novo, the evidence not being limited to that presented to the commissioner but new and additional evidence may [de] adduced. Tacker v. Alexander, 275 U. S. 228; U. S. v. Rindskopf, 105 U. S. 418; Fidelity & Columbia Trust Co., v. Lucas, 7 F. 2d 146, (D.C.W.D.Ky.); Paul Jones Co. v. Lucas, 33 F 2d 907, affirmed, 64 F. 2d 1016.

And recovery may be had for a sum less than the amount of the refund asked by the claim. United States [—] Rindskopf, supra.

The only limitation is that recovery can only be had on the grounds presented to the commissioner. Taber v. United States, 59 F. 2d 568, 571 (8 CCA); Paul Jones Co. v. Lucas, supra.

The claim, of course, must be in sufficient detail to apprise the Commissioner of the grounds upon which the refund is asked to facilitate research by him. United States v. Garbutt Oil Co., 302 U. S. 528, 533; Lee Wilson & Co. v. Commissioner, supra.

I am satisfied and find that the evidence introduced by the taxpayer was based upon grounds of recovery set forth in its claim and was sufficient in detail to apprise the commissioner of its claim, and further evidence would have been adduced before the commissioner had it not been for his position that recovery could not be had for refunds [fol. 22] prior to June 30, 1939, as a matter of law.

I am resolving the case in favor of the taxpayer and the attorneys for the F. W. Fitch Company may prepare findings of fact and conclusions of law in keeping with the findings of fact and conclusions of law made or suggested herein, and exceptions are allowed.

Signed this 19th day of June, 1943.

CHAS. A. DEWEY,
United States District Judge.

[fol. 23] Findings of Fact and Conclusions of Law

Filed in U. S. District Court August 10, 1943.

The above entitled action came on for hearing on its merits at Des Moines, Iowa, on the 24th and 25th days of

May, 1943, evidence was introduced, arguments had, and the suit fully submitted to the court for decision.

In the action the plaintiff seeks to recover from the United States of America certain manufacturer's excise taxes alleged to have been illegally and wrongfully paid to the Collector of Internal Revenue commencing with October, 1936 and ending with June, 1939.

Findings of Fact

1. The F. W. Fitch Company, plaintiff herein, is and was during the period from October 1, 1936 and throughout the period covered by this controversy, a corporation organized and existing under the laws of the State of Iowa, with its principal place of business in the City of Des Moines, Iowa, within the jurisdiction of this court.

2. That plaintiff was during said period engaged in the manufacture and sale of cosmetics and toiletries which were subject to the manufacturer's excise tax, some of which were taxable at the rate of 10% and some at the [fol. 24] rate of 5%.

3. For the period from October 1, 1936 to and including the month of June, 1939 plaintiff duly filed monthly manufacturer's excise tax returns, reporting thereon tax liabilities in the aggregate amount of $319,170.48 which was assessed and paid on the date of filing of the said monthly returns.

4. That said payments were made to Chas. D. Huston, Collector of Internal Revenue for the Collection District of Iowa. That said Chas. D. Huston was not in office as the Collector of Internal Revenue at the date of the commencement of this action.

5. On October 8, 1940 plaintiff duly filed a claim for refund on form 843, which is a form printed and published by the Treasury Department for the filing of refund claims with respect to manufacturer's excise taxes levied under the Revenue Act of 1932 and subsequent amendments; that in said claim plaintiff demanded a refund of $67,666.39 for excise taxes paid for the period extending from April 1, 1936 to and including June 30, 1940.

6. The Court finds that immediately upon the filing of the claim by the taxpayer the Commissioner took the position that he would not refund advertising and selling expenses as manufacturer's costs or any claim for refund of taxes on said expenditures prior to June 30, 1939; that any conference or hearing on the taxpayer's claim for refund prior to June 30, 1939 would be futile and ineffective. And that the Bureau was committed to a refusal of such claims made prior to June 30, 1939; and that it would adhere to the decision in the Ayer vs. United States, 39 F. Supp. 284, and would not follow the Campana case.

7. The Commissioner's request for additional evidence relating to proof that the tax had been absorbed by the taxpayer, referred only to the period subsequent to June 30, 1939, after which date selling and advertising expenses were deductible by the 1939 amendment to section 3441.

8. The plaintiff in its correspondence with the Commissioner waived its claim for the period after June 30, 1939.

[fol. 25] 9. The statement in the letter from the Commissioners dated June 12, 1941, following the rejection of the claim in full, to the effect that the allowance could not be made in any event because of the failure to file the additional evidence was an afterthought and would not effect the waiver of the filing of such evidence which the Commissioner had clearly indicated in his former communications. The submission of additional evidence on the proposition that the taxpayer had not passed the tax on to the consumer would not have changed the Commissioner's decision with respect to the deductibility of selling and advertising expenses.

10. Plaintiff divided its customers into five classifications, namely, barber and beauty supply dealers, chain and syndicate stores, customers purchasing a line of cosmetics known as "Beauty by Fitch", wholesale and retail drug stores, and purchasers of special label merchandise.

11. The above classifications of customers paid no more to plaintiff for its merchandise because of the imposition of the manufacturer's excise tax. Plaintiff paid the tax and did not pass it on to its customers.

12. Plaintiff also sold merchandise to drug jobbers and wholesalers and special labeled merchandise and on such sales added the tax to the selling price, no refund thereof is claimed.

13. During the period in controversy, plaintiff expended the sum of $2,088,510.90 for selling and advertising all of its products and a large proportion of its sales was made to barbers, beauty supply dealers, chain stores and customers purchasing a line of cosmetics known as "Beauty by Fitch" and all such sales were made at arm's length; and on all of such sales plaintiff did not add the manufacturer's excise tax to the selling price but [sbsorbed] and bore the burden of said tax.

14. Plaintiff did not deduct from its selling price, the amount expended in advertising and selling said products.

[fol. 26] 15. The reasonable, proper and fair method of computing the amount of credit for the expense for selling and advertising between the various classifications of sales is to make such allocation in the proposition that each classification of sales bears to the total sales of all articles advertised and sold.

16. The amount of selling and advertising expense chargeable to sales to barber and beauty supply dealers and stores, sales to chain and syndicate store and sales of products known as "Beauty by Fitch" and which were subject to the manufacturer's excise tax at the rate of 5% is the sum of $574,796.67; that the amount of advertising and selling expense properly chargeable to sales of merchandise to barber and beauty supply dealers and stores, chain and syndicate stores and products known as "Beauty by Fitch" and which were taxable at the rate of 10% is the sum of $236,321.06. That no part of said expense was deducted from the sales price of such merchandise in calculating and paying the excise tax. That the items comprising the above expense are properly classified as, and are selling and advertising expenses.

17. Selling and advertising expenses are deductible from the selling price in computing and selling price upon which the manufacturer's excise tax is based.

18. From October 1, 1936 through and including June 30, 1939, plaintiff paid to defendant $59,718.88 in excess of the amount of manufacturer's excise taxes owed by plaintiff. Defendant owes plaintiff $59,718.88 and interest thereon from the dates of payment to the date of the decision of this court; interest in the amount of $19,309.89.

19. The parties hereto entered into a stipulation attached to which there were certain exhibits, the contents of said stipulation and exhibits are found to be true and correct facts of what they purport to show.

[fol. 27] Conclusions of Law

1. This court has jurisdiction of the parties and subject matter of this action.

2. Trial on the issues of this court is de nono, the evidence is not limited to that presented to the Commissioner, new and additional evidence may be adduced.

3. Any recovery may be had for a sum less than the amount of the refund asked by the claim. The only limitation is that recovery can only be had on the grounds presented to the Commissioner.

4. The Commissioner waived his regulations and compliance therewith regarding the necessity of the filing of evidence establishing that the tax payer had borne the burden of the tax.

5. Selling and advertising expenses are deductible from the sales price of the cosmetic and toiletries sold by plaintiff during the period in controversy for the purpose of ascertaining the manufacturer's excise tax and said deductions consisting of selling and advertising expenses are not subject to said tax. Campana Corp. vs. Harrison, 114 F. 2nd 200.

To all of which defendant excepts.

Dated at Des Moines, Iowa, this 10th day of August, A.D. 1943.

CHAS. A. DEWEY,
Judge.

Service of these Findings of Fact and Conclusions of Law is hereby accepted and receipt of a true copy thereof acknowledged on this 10th day of August, A.D. 1943.

UNITED STATES OF AMERICA,
Defendant.

By Wm. R. Sheridan
Assistant U. S. Attorney.

[fol. 28] Judgment Entry

Filed in U. S. District Court August 10, 1943.

Now on this 10th day of August, A.D. 1943, the above entitled matter came on for hearing before the Honorable Charles A. Dewey, Judge of the United States District Court, Southern District of Iowa, Central Division.

The case having been heretofore fully submitted and the Court after hearing the evidence and arguments and being fully advised in the premises made Findings of Fact and Conclusions of Law in which he found in favor of this plaintiff.

The court further finds that plaintiff is entitled to a Judgment of $59,718.88 together with interest thereon to date in the amount of $19,309.89.

It Is Therefore Hereby Ordered, Adjudged And Decreed that plaintiff should be and it is hereby given a Judgment in its favor and against the defendant in the amount of $79,028.77. United States of America excepts.

CHAS. A. DEWEY,
Judge.

[fol. 29] Notice of Appeal

Filed in U. S. District Court on October 6, 1943.

United States of America, the defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Eighth Judicial Circuit from the judgment

entered herein in favor of the plaintiff and against the defendant in the sum of $59,718.88, and interest.

MAURICE F. DONEGAN,
United States Attorney.

Des Moines, Iowa,
Oct. 6, 1943.

Copy of Notice of Appeal mailed to Haemer, Wheatcraft, 426 Fleming Bldg., Des Moines, Iowa, Attorney for Plaintiff.

N. F. REED, Clerk,
By Geneva E. Thoma, Deputy.

[fol. 30] (Designation of matters to be contained in transcript on appeal.)

Filed in U. S. District Court on October 9, 1943.

United States of America, the defendant above named, hereby designates the following to be included in the record on appeal in the above entitled cause:

1. Summons and Complaint.
2. Answer.
3. Opinion of the Court.
4. Findings of Fact and conclusions of Law.
5. Judgment.
6. Notice of appeal.

MAURICE F. DONEGAN,
United States Attorney.

CLOID I. LEVEL,
Assistant United States Attorney.

WILLIAM R. SHERIDAN,
Assistant United States Attorney.

[fol. 31] Statement of Points

Filed in U. S. District Court on October 23, 1943.

United States of America, the defendant above named, intends to rely upon the following points:

1. The District Court erred in permitting the deduction of advertising and selling costs from the manufacturer's prices in computing the tax under Section 603 of the Revenue Act of 1932.

2. The District Court erred in holding that Section 619 (a) of the Revenue Act of 1932 permits, in determining the price upon which the manufacturer's excise tax shall be assessed, the exclusion of advertising and selling expenses of the manufacturer.

MAURICE F. DONEGAN,
United States Attorney.

C. I. LEVEL,
Assistant United States Attorney.

WM. R. SHERIDAN,
Assistant United States Attorney.

Acceptance of Service of Statement of Points Filed in U. S. District Court October 30th, 1943.

Service of the Statement of Points Accepted this 23rd day of October, 1943, and copy received.

HAEMER WHEATCRAFT,
One of the Attorneys of Record for the Plaintiff.

[fol. 32] Clerk's Certificate to Transcript.

United States of America
Southern District of Iowa—ss.:

I, N. F. Reed, Clerk of the District Court of the United States for the Southern District of Iowa, hereby certify the foregoing 31 pages to contain a full, true and complete transcript of the record in the case of The F. W. Fitch Company (a corporation), Plaintiff, vs. United States of America, Defendant, No. 191-Civil, Central Division, as called for in the Designation of the parts of the record, proceedings and evidence to be included in the Record on Appeal, filed October 9, 1943, as full, true and complete as

the originals thereof on file and of record in office in the City of Des Moines, in said District.

In Witness Whereof, I hereunto set my hand and affix the seal of said Court at office in the City of Des Moines, in said District this 1st day of November, A. D. 1943.

Seal
U. S. Dist. Court
Dist. of Iowa.

N. F. REED,
Clerk, United States District Court, Southern District of Iowa.

Filed Nov. 2, 1943, E. E. Koch, Clerk.

[fol. 32] And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz.:

(Appearance of Mr. Samuel O. Clark, Jr., and Mr. Sewall Key as Counsel for Appellant.)

United States Circuit Court of Appeals,
Eighth Circuit.

United States of America, Appellant,
No. 12749. vs.
The F. W. Fitch Company.

The Clerk will enter our appearances as Counsel for the Appellant.

SAMUEL O. CLARK, JR.,
Assistant Attorney General

SEWALL KEY,
Special Assistant to the Attorney General.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 2, 1943.

(Appearance of Mr. Maurice F. Donegan as Counsel for Appellant.)

The Clerk will enter my appearance as Counsel for the Appellant.

MAURICE F. DONEGAN,
United States Attorney.

(CLOID I. LEVEL)
Ass't U. S. Attorney.

(WM. R. SHERIDAN)
Ass't U. S. Attorney.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 6, 1943.

[fol. 33] (Appearance of Mr. Frederic G. Rita as Counsel for Appellant.)

The Clerk will enter my appearance as Counsel for the Appellant.

FREDERIC G. RITA,
Special Ass't to the Attorney General.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 8, 1944.

(Appearance of Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

ARNOLD F. SCHAETZLE,
RICHARD E. WILLIAMS,
HAEMER WHEATCRAFT,
203 Hubbell Building,
Des Moines (9) Iowa.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 8, 1943.

[fol. 34] (Order of Submission.)

March Term, 1944.

Wednesday, March 8, 1944.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Frederic G. Rita, Special Assistant to The Attorney General, for appellant, continued by Mr. Arnold F. Schaetzle and Mr. Richard E. Williams for appellee, and concluded by Mr. Frederic G. Rita, Special Assistant to The Attorney General, for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 35] (Opinion.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 12,749.

United States of America, Appellant,
vs.
The F. W. Fitch Company, a corporation, Appellee.

Appeal from the District Court of the United States for the Southern District of Iowa.

[March 29, 1944.]

Mr. Frederic G. Rita, Special Assistant to the Attorney General (Mr. Samuel O. Clark, Jr., Assistant Attorney General, Mr. Sewall Key, and Mr. A. F. Prescott, Special Assistants to the Attorney General, Mr. Maurice F. Donegan, United States Attorney, and Mr. Cloid I. Level and Mr. William R. Sheridan, Assistant United States Attorneys, were with him on the brief) for appellant.

Mr. Arnold F. Schaetzle and Mr. Richard E. Williams (Mr. Haemer Wheatcraft was with them on the brief) for appellee.

Before SANBORN, THOMAS and RIDDICK, Circuit Judges.

SANBORN, Circuit Judge, delivered the opinion of the Court.

The question presented by this appeal is whether § 619 (a) of the Revenue Act of 1932 (c. 209, 47 Stat. 169, 267;

26 U.S.C.A. Internal Revenue Acts, p. 618) authorized the deduction of advertising and selling expenses in computing the price upon which the manufacturers' excise tax imposed by § 603 of the Act (c. 209, 47 Stat. 169, 261; 26 U.S.C.A. Internal Revenue Acts, p. 608) is based.

Section 603 of the Revenue Act of 1932 imposed an excise tax upon toilet preparations sold by manufacturers, producers and importers, equivalent to a certain percentage of "the price for which so sold." Section 619(a) of the Act provided:

"In determining, for the purposes of this title, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this title, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations."

The appellee, during the tax period October 1, 1936, to and including the month of June, 1939, manufactured and sold toilet preparations which were subject to the excise tax. In computing prices in its monthly excise tax returns it made no deductions for its advertising or selling expenses. In October, 1940, it filed a claim for a refund of $67,666.39 based upon its failure to deduct such expenses in determining prices. The Commissioner of Internal Revenue denied the claim for refund upon the ground that, under § 619(a), advertising and selling expenses were not deductible in determining selling prices. The appellee brought this action to recover its alleged overpayment of excise taxes. The case was tried without a jury. The District Court determined that the appellee was entitled to deduct advertising and selling expenses in computing its

prices on toilet preparations subject to the excise tax, and that its failure to take these deductions had resulted in overpayment of its taxes to the extent of $59,718.88, which it was entitled to recover with interest. A judgment was entered accordingly, and this appeal followed.

The words of § 619(a) which give rise to this controversy are the words "or other charge" found in the second sentence of the section, which sentence, so far as pertinent, reads: "A transportation, delivery, insurance, installation, or other charge * * * shall be excluded from the price * * *." The appellee argues that the plain meaning of this language is that all nonmanufacturing costs are to be excluded by a manufacturer in determining selling price for the purposes of the excise tax. The government contends that no authorization for excluding advertising or selling expenses can reasonably be deduced from the words "or other charge" in the light of their context or the legislative history of the statute.

The appellee's construction of § 619(a) is sustained by the decisions of the Circuit Court of Appeals of the Seventh Circuit in *Campana Corporation* v. *Harrison*, 114 F.2d 400, 411, and *Campana Corporation* v. *Harrison*, 135 F.2d 334, 336. The government's interpretation of the section is supported by the Court of Claims in *Ayer Co.* v. *United States*, 38 F.Supp. 284, 289. The court below was of the opinion that the construction placed upon § 619(a) by the Circuit Court of Appeals of the Seventh Circuit was correct.

It seems clear to us that the words "or other charge" must be taken and understood to mean "or other like charge". This because of the familiar rule of *ejusdem generis*. (*United States* v. *Gilliland*, 312 U.S. 86, 93.) We do not regard the expense of advertising and selling an article as being substantially similar to a charge for the transportation, delivery, insurance, or installation of the article sold. The charges expressly specified in § 619(a) to be excluded in determining the manufacturer's price for

the purpose of excise tax are not manufacturing costs, but they obviously have little or no relation to expenditures made by the manufacturer to create a market for or to sell his products. It is possible, of course, that Congress may have intended that, for the purpose of the excise tax, the price should not include the manufacturer's advertising and selling expense, but, if so, the intent was very inadequately expressed. The legislative history of § 619(a), we think, shows no clear Congressional purpose to exclude advertising and selling costs in determining the price of articles subject to the excise tax.

In *Helvering* v. *Rebsamen Motors, Inc.*, 128 F.2d 584, 587-588, this Court said: "One may honestly and reasonably believe that in drafting a taxing act Congress uses the language which most nearly expresses the legislative intent, and that if the language used fails properly to express that intent, corrections should be made by Congressional action and not by Treasury regulations or by judicial construction."

In the Revenue Act of 1939, enacted June 29, 1939 [c. 247, § 3(a), 53 Stat. 863; 26 U.S.C.A. Internal Revenue Acts, pages 1167-1168], Congress provided that, in determining the selling price of articles subject to the manufacturers' excise tax on toilet preparations, there should be excluded "a transportation, delivery, insurance, or other charge, and the wholesaler's salesmen's commissions and costs and expenses of advertising and selling," but made this amendment effective "only with respect to sales made after the date of the enactment of this Act." The changes made in the statute in 1939 are not, we think, of controlling significance in determining the intent of Congress in enacting § 619(a) of the Revenue Act of 1932. Compare *Helvering* v. *Rebsamen Motors, Inc., supra.* These changes indicate, however, that it was not the understanding of the Congress which made them that prior to June 29, 1939, advertising and selling costs were deductible in de-

termining the selling price of an article subject to the excise tax.

While we dislike to differ with the Circuit Court of Appeals of the Seventh Circuit with respect to the construction of § 619(a) of the Revenue Act of 1932, it is our opinion that that section reasonably may not be construed as authorizing a manufacturer to deduct advertising and selling expenses in determining the prices of his products subject to the excise tax.

The judgment appealed from is reversed, and the case is remanded with directions to enter a judgment dismissing the appellee's complaint.

[fol. 40] (Judgment.)

United States Circuit Court of Appeals,
Eighth Circuit.

March Term, 1944.

Wednesday, March 29, 1944.

United States of America, Appellant,
No. 12749. vs.
The F. W. Fitch Company, a corporation.

Appeal from the District Court of the United States for the Southern District of Iowa.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Iowa, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby reversed without the taxation of costs in favor of either of the parties in this Court.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to enter a judgment dismissing the appellee's-plaintiff's complaint.

March 29, 1944.

[fol. 41] (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Southern District of Iowa as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause wherein the United States of America was Appellant and The F. W. Fitch Company, a Corporation, was Appellee, No. 12749, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the 17th day of April, A. D., 1944, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the Southern District of Iowa.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 11th day of May, A. D., 1944.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

[fol. 42] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 181

THE F. W. FITCH COMPANY, A CORPORATION,
Petitioner,

V.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. ——

THE F. W. FITCH COMPANY, A CORPORATION,
Petitioner,

V.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The F. W. Fitch Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered in the above entitled cause on March 29, 1944, reversing a decision of the District Court of the United States for the Southern District of Iowa and remanding for further proceedings in conformity with its opinion.

OPINIONS BELOW.

The opinion of the District Court (R. 15-23) is reported in 52 F. Supp. 292. The opinion of the Circuit Court of Appeals (R. 34-38) is reported in 141 F. (2d) 380.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 29, 1944. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. Section 347).

QUESTION PRESENTED.

Whether Section 619(a) of the Revenue Act of 1932 (c. 209, 47 Stat. 169, 267; 26 U. S. C. A. Internal Revenue Acts, p. 618) authorized the deduction of advertising and selling expenses in computing the price upon which is based the manufacturers' excise tax imposed by Section 603 of the Act (c. 209, 47 Stat. 169, 261; 26 U. S. C. A. Internal Revenue Acts, p. 608).

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved will be found in Appendix A, *infra*, pp. 10-11.

STATEMENT.

The material facts as found by the District Court are substantially as follows:

The F. W. Fitch Company, petitioner, is and was during the period from October 1, 1936 and throughout the period ending June 30, 1939, a corporation existing under the laws of the State of Iowa. (R. 21) During such period the petitioner was subject to a manufacturer's excise tax under Sections 603 and 619(a) of the Revenue Act of 1932. It was engaged in the manufacture and sale of cosmetics and toiletries which were subject to the manufacturer's excise tax, some at the rate of 10% and some at the rate of 5%. For said period the petitioner duly filed monthly manufacturer's excise tax returns, reporting thereon tax lia-

bility in the aggregate amount of $319,170.48 which was assessed and paid on the dates of filing of said monthly returns. (R. 24)

Petitioner divided its customers into five classifications; namely, barber and beauty supply dealers, chain and syndicate stores, customers purchasing a line of cosmetics known as "Beauty by Fitch", wholesale and retail drug stores, and purchasers of special label merchandise. (R. 25) On sales to drug wholesalers and to purchasers of special label merchandise, petitioner added the tax to the selling price and no refund thereof was claimed. (R. 26) A large proportion of petitioner's sales was made to the other classes of customers. All such sales were made at arm's length and petitioner did not add the manufacturer's excise tax to the selling price but absorbed and bore the burden of same. (R. 25)

In arriving at the base upon which the tax was levied and assessed, the petitioner did not deduct from its selling price the amount expended in advertising and selling said products. The amount of selling and advertising expense chargeable to sales with respect to which petitioner absorbed and bore the burden of the tax and which were subject to excise tax at the rate of 5%, was the sum of $574,796.67. The amount of advertising and selling expense properly chargeable to such sales which were taxable at the rate of 10%, was the sum of $236,321.06. No part of this selling and advertising expense was deducted in calculating the excise tax paid on such sales. (R. 26)

The District Court found and held that the above selling and advertising expenses were deductible in computing the selling price upon which the excise tax was based. Accordingly said court found that for the period from October 1, 1936 to and including June 30, 1939, petitioner paid the sum of $59,718.88 in excess of the amount of excise taxes owed by petitioner. (R. 27) Judgment for the overpay-

ment, with interest, was entered August 10, 1943 for $79,028.77. (R. 28)

The Circuit Court of Appeals for the Eighth Circuit held that advertising and selling expenses are not deductible in computing the excise tax base under Section 619(a) of the Revenue Act of 1932. On March 28, 1944 said court reversed the judgment of the District Court remanding the case with directions to enter a judgment dismissing the petitioner's complaint. (R. 34-38)

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

(1) In holding that advertising and selling expenses are not deductible by a manufacturer of cosmetics and toilet preparations under section 619(a) of the Revenue Act of 1932 in determining the sale price upon which the manufacturer's excise tax is to be levied and assessed under section 603 of the Revenue Act of 1932.

(2) In holding that section 619(a) of the Revenue Act of 1932 which authorized the exclusion of a "transportation, delivery, insurance, installation or other charge" in determining the sale price for the purpose of the tax, could not be construed as authorizing a manufacturer to deduct advertising and selling expense as an "other charge".

(3) In holding that the rule of *ejusdem generis* must be applied to construe section 619(a) of the Revenue Act of 1932 with respect to the phrase "or other charge".

(4) In any case, if the rule of *ejusdem generis* is to be applied, in failing to hold that section 619(a) of the Revenue Act of 1932 divides the elements entering into the sales price upon which the tax is to be levied into two categories, i. e. manufacturing costs and distribution costs, and in holding that selling and advertising expenses are not such distribution costs as are specifically excluded by the Act.

(5) In holding that adoption of the Revenue Act of

(3) sold (otherwise than through an arm's length transaction) at less than the fair market price;

the tax under this title shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Commissioner.

SEC. 621. CREDITS AND REFUNDS.

* * *

(d) No overpayment of tax under this title shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund.

APPENDIX B.

Pertinent Portions of the Decision in

Campana Corporation v. Harrison,
114 F. (2d) 400.

Circuit Court of Appeals, Seventh Circuit
August 14, 1940.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division; Philip L. Sullivan, Judge.

Action by the Campana Corporation against Carter H. Harrison, individually and as Collector of Internal Revenue for the First Collection District of Illinois, to recover additional manufacturer's excise taxes paid under protest. From a judgment for plaintiff, the defendant appeals.

Reversed and remanded, with directions.

Before MAJOR, TREANOR, and KERNER, Circuit Judges.

KERNER, Circuit Judge.

This is an action brought against the revenue collector for the United States to recover additional manufacturer's excise taxes paid under protest. The plaintiff filed its Manufacturer's excise tax return under the law and paid the tax. Revenue Act of 1932, 47 Stat. 259, ch. 209, secs. 601, *et seq.*, 26 U. S. C. A. Int. Rev. Acts, page 603, *et seq.* Then the Commissioner of Internal Revenue assessed an additional tax and this tax the taxpayer paid under protest. Timely application for a refund of the additional amount paid was made and denied. Thereupon the taxpayer sued in the District Court and the Court (sitting without a jury) found for the taxpayer. The defendant Collector appealed to this Court seeking a reversal of the judgment.

Campana Corporation is engaged in the manufacture and sale of a toilet preparation or cosmetic known as "Cam-

> may be deducted from the basis of the sale price of the Campana Sales Company. Since our opinion in that case, Congress has repealed entirely the statute imposing the 'manufacturers' excise tax here involved. Before that Congressional action and subsequent to the attachment of the taxes here involved, Congress had amended the statute so as to permit the deduction of these expenses. 53 Stat. 862, 863, 26 U. S. C. A. Int. Rev. Code, Section 3401. We thought the statute was capable of a construction that would permit such deductions, authorized by the amendment, before the amendment was passed. We still think so. The fairness of this construction is borne out by subsequent events. We think Congress intended all along that these expenses were deductible as "other charges" within the meaning of Sec. 619(a), 47 Stat. 169, 267, 26 U. S. C. A. Int. Rev. Code, Section 3441(a). We are not disposed to disturb our decision in the former case.

It thus appears that there is a direct conflict between the decision of the Circuit Court of Appeals for the Eighth Circuit in the case at bar and the decisions of the Circuit Court of Appeals for the Seventh Circuit in the *Campana* cases, *supra;* also there is a direct conflict between the decision of the Court of Claims in the case of *Ayer Co. v. United States, supra,* and the said decisions of the Circuit Court of Appeals for the Seventh Circuit. Inferentially there is a conflict between the decision of the United States Circuit Court of Appeals for the Second Circuit in the case of *Bourjois, Inc. v. McGowan, supra,* and both the Circuit Court of Appeals for the Eighth Circuit in the instant case and the Court of Claims in the *Ayer* case.

In view of the confusion and uncertainty which exists because of the conflicting opinions of the different Circuit Courts of Appeal it is respectfully urged that this petition should be granted.

(2) The decision of the Circuit Court of Appeals in this case decides a federal question in a way probably in conflict with applicable decisions of this court.

In its opinion (R. 37) the court below said:

> In the Revenue Act of 1939, enacted June 29, 1939 [c. 247, Section 3(a), 53 Stat. 863; 26 U. S. C. A. Internal Revenue Acts, pages 1167-1168], Congress provided that, in determining the selling price of articles subject to the manufacturers' excise tax on toilet preparations, there should be excluded "a transportation, delivery, insurance, or other charge, and the wholesaler's salesmen's commissions and costs and expenses of advertising and selling," but made this amendment effective "only with respect to sales made after the date of the enactment of this Act." The changes made in the statute in 1939 are not, we think, of controlling significance in determining the intent of Congress in enacting Section 619(a) of the Revenue Act of 1932. Compare *Helvering v. Rebsamen Motors, Inc., supra.* These changes indicate, however, that it was not the understanding of the Congress which made them that prior to June 29, 1939, advertising and selling costs were deductible in determining the selling price of an article subject to the excise tax.

This court, in *Haggar Co. v. Helvering*, 308 U. S. 389, held that a later amendment cannot be employed to ascertain what Congress intended by a prior law. The language of this court in its opinion is as follows (p. 400):

> If we are to draw inferences it would seem as probable that Congress was content to leave the problems of the past to be solved by the courts where they were then pending, rather than to preclude their solution there. Action so ambiguous in its implications as to the past is wanting in that certainty and evident purpose which would justify its acceptance as a legislative declaration of what an earlier Congress had intended rather than an effort to make clear that which had been rendered dubious by unwarranted administrative construction.

In view of the above quoted language of this court it is submitted that the changes made in the Revenue Act of 1939 may not be taken to indicate what the intent of the earlier Congress may have been. It would be just as logical to con-

clude that the 1939 Congress was merely stating in statutory form what had always been the correct interpretation of the earlier statute.

(3) In this case the Circuit Court of Appeals for the Eighth Circuit has decided an important question of Federal law which has not been but should be settled by this court. The question presented involves the Federal revenues and, unless it is settled, taxpayers in one jurisdiction may be afforded relief while taxpayers in other jurisdictions will be denied relief even though the facts and circumstances of their respective cases are identical.

CONCLUSION.

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

ARNOLD F. SCHAETZLE,
JAMES M. STEWART,
Counsel for Petitioner.

June, 1944

APPENDIX A.

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 603. TAX ON TOILET PREPARATIONS, ETC.

There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which sold: Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, tooth and mouth washes (except that the rate shall be 5 per centum), dentifrices (except that the rate shall be 5 per centum), tooth pastes (except that the rate shall be 5 per centum), aromatic cachous, toilet soaps (except that the rate shall be 5 per centum), toilet powders, and any similar substance, article, or preparation, by whatsoever name known or distinguished; any of the above which are used or applied or intended to be used or applied for toilet purposes.

SEC. 619. SALE PRICE.

(a) In determining, for the purposes of this title, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this title, whether or not stated as a separate charge. A transportation, delivery, insurance, installation or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

(b) If an article is—

(1) sold at retail;

(2) sold on consignment;

1939, which provided that in determining the selling price of articles subject to the excise tax on toilet preparations, there should be excluded "* * * expenses of advertising and selling", indicated that it was not the understanding of the Congress which passed the Revenue Act of 1932, that advertising and selling expenses were deductible.

(6) In concluding that the legislative history of section 619(a) of the Revenue Act of 1932 shows no clear congressional purpose to exclude advertising and selling costs in determining the price of articles subject to the excise tax.

(7) In reversing the decision of the District Court of the United States for the Southern District of Iowa and in remanding the cause with directions to dismiss petitioner's complaint.

REASONS FOR GRANTING THE WRIT.

(1) The decision below fails to correctly interpret Section 619 of the Revenue Act of 1932 and is in direct conflict with the decisions of the Circuit Court of Appeals of the Seventh Circuit in *Campana Corporation v. Harrison*, 114 F. (2d) 400, 411, and *Campana Corporation v. Harrison*, 135 F. (2d) 334, 336. In its opinion the Court below recognizes the conflict by making the following statement (R. 38):

> While we dislike to differ with the Circuit Court of Appeals of the Seventh Circuit with respect to the construction of Section 619(a) of the Revenue Act of 1932, it is our opinion that that section reasonably may not be construed as authorizing a manufacturer to deduct advertising and selling expenses in determining the prices of his products subject to the excise tax.

The pertinent portions of the decision of the Circuit Court of Appeals for the Seventh Circuit in *Campana Corporation v. Harrison*, 114 F. (2d) 400 is set out in Appendix B, pp. 12-17.

In the case of *Bourjois, Inc. v. McGowan*, 12 F. Supp. 787, the District Court of the United States for the Western District of New York said (p. 793):

> To allow salesmen's commissions and costs and expenses of advertising and selling to be excluded from the sale price, the amount thereof, under Section 619(a), *supra*, must be established to the satisfaction of the Commissioner and that means there must be some basis on which a deduction can be made on account of such expenses. There is nothing in the record to show the amount of such commissions and costs or what the actual expenses were. We, therefore, are not required to determine whether any deduction should be made. The determination as made by the Commissioner without any proof of actual expense of sales is right.

The Circuit Court of Appeals for the Second Circuit in *Bourjois, Inc. v. McGowan*, 85 F. (2d) 510, affirmed the above decision without discussion of the above quoted language of the District Court. It therefore appears that the Circuit Court of Appeals for the Second Circuit may also be of the opinion that advertising and selling expenses would be deductible if the amounts thereof were properly proven. This court denied certiorari. 57 S. Ct. 753, 300 U. S. 682.

In the case of *Ayer Co. v. United States*, 38 F. Supp. 284, the Court of Claims ruled that advertising and selling expenses are not deductible under Section 619(a) of the Revenue Act of 1932 in arriving at the selling price upon which the tax is based. This decision is in direct conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Campana Corporation v. Harrison*, 114 F. (2d) 400. Following said decision of the Court of Claims the Circuit Court of Appeals for the Seventh Circuit reaffirmed its decision in the case of *Campana Corporation v. Harrison*, 135 F. (2d) 334 in the following language (p. 336):

> The Commissioner has asked us to overrule *Campana Corporation v. Harrison*, 7 Cir., 114 F. 2d 400, insofar as it holds that the selling and advertising costs

pana's Italian Balm," with its principal place of business at Batavia, Illinois. Since the date of the taxing statute (June 21, 1932) this face and hand lotion has been subject to a manufacturer's excise tax equivalent in amount to 10% of "The price for which so sold." Section 603 of the Revenue Act of 1932. The statute requires monthly tax returns and payments, and in the instant case the tax month in controversy is July, 1933.

Campana Corporation was organized in 1926 and prior to July 1, 1933 was engaged both in the manufacture and the distribution (including advertising and sales promotion) of "Campana's Italian Balm." On July 1, 1933, a contract for the exclusive distribution and sale of Campana's Italian Balm went into effect. By this sales contract the Campana Corporation agreed to sell its product exclusively to E. M. Oswalt (60% stockholder of Campana Corporation) or his corporate transferee. As sales price for the product Oswalt agreed to pay an amount equal to the cost of production of the artcle plus 39% of this cost. Then Oswalt organized the Campana Sales Company and on July 1, 1933 transferred the sales contract to it.

* * *

Tax basis. * * *

When the manufacturers' excise tax bill was reported out of the Committee on Ways and Means, it was explained to the many Representatives on the floor of the House. Mr. Crisp, acting Chairman of the Committee, emphasized that the tax was a manufacturer's tax levied not on the retail price but on the manufacturer's wholesale price. That the manufacturer's price to the wholesalers was to be the starting point of tax computation, appeared again and again in the explanation of the bill. See Vol. 75, Congressional Record, pp. 5693, 5694, 5789 and 5904. The Senate was told the same thing by its Committee on Finance. "The manufacturer's excise tax proposal is to levy the tax once, upon

the article in its finished state, but at its wholesale selling price, not at the retail price." Senate Report #665; Vol. 75, Congressional Record, pp. 10085, 11361, 11657.

However, the legislators realized that not all manufactured articles passed through the hands of the wholesalers before reaching the consuming public. In these situations the legislators intended the tax basis to be the wholesale price if that price could be established. Nor did they intend the tax basis to include costs other than the normal manufacturing costs. For instance, to the question—"Does the manufacturer's price that is contemplated include salesmen's commissions?"—Mr. Crisp answered that the "Selling cost is not intended to be added." Vol. 75, Congressional Record, p. 5693. On ths point House Report #708 and Senate Report #665 plainly indicate that from the tax basis was to be excluded any charge having no connection whatever with the manufacturing process.

From the legislative history above related, it appears that (1) a manufacturer's tax was intended, (2) a price which would reflect normal manufacturing costs was to be the basis of the tax, and (3) the wholesale price adjusted if necessary to exclude non-manufacturing costs, ordinarily would be such a price. In this light the meaning of the statute becomes plain indeed. Sec. 603 imposes upon cosmetics and toilet preparations "sold by the manufacturer * * * a tax equivalent to 10 per centum of the price for which so sold." Sec. 619(b), 26 U. S. C. A. Int. Rev. Code Section 3411(b), provided that if an article is sold at retail, on consignment, or at less than the fair market price and otherwise than through an arm's length transaction, then the tax "shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof * * *." And Sec. 619(a) provides that in "determining * * * the price for which an article is sold,

there shall be included any charge * * * incident to placing the article in condition packed ready for shipment * * *. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price * * *."

In interpreting Sec. 619(a) of the statute the Treasury Department stated that "charges which have no connection with the manufacturing process * * * are to be excluded in computing the tax." Article 12 of Regulation 46, promulgated under the Revenue Act of 1932. In this connection it is to be noted that in 1939 Congress deleted the second sentence of Section 619(a) and substituted the following: "Whether sold at arm's length or not, a transportation, delivery, insurance, or other charge, and the wholesaler's salesmen's commissions and costs and expenses of advertising and selling (not required by the foregoing sentence to be included), shall be excluded from the price * * *." 53 Stat. 862, 863, 26 U. S. C. A. Int. Rev. Code Section 3401. No legislative comment or explanation was given for the 1939 change.

It follows from what has been said that the taxpayer has failed to comply with the statute and that the Commissioner was justified under the circumstances in computing the tax on the wholesale price. We conclude therefore that the District Court erred in holding that the inter-company price represented the tax basis: its findings in this respect do not support the conclusion rendered thereon.

Selling and advertising costs. One more subject remains to be discussed. The selling and advertising expenses of the selling corporation—which pertain exclusively to the nation-wide process of marketing and distributing the taxable product—are not manufacturing costs. The evidence is that the selling corporation sells to wholesalers by promising that it will "sell what the wholesaler buys," and that the selling corporation does this very thing, in effect

selling the taxable article three times over. In this regard the taxpayer's complaint alleges that the "Commissioner erred in failing to reduce the price at which Campana Sales Company sold said articles by advertising and selling costs and expenses paid or incurred by said Campana Sales Company during July, 1933, in determining the price of articles subject to tax under the provisions of Section 603 of the Revenue Act of 1932."

At the trial the taxpayer adduced evidence which showed, and the District Court so found, that the selling and advertising costs of the Campana Sales Company amounted to $29,792.05 for July of 1933. In our discussion of the statute we stated that non-manufacturing charges were to be excluded in computing the tax. Further discussion would not add more than what was said there: the statute directs the exclusion of the selling and advertising costs (of the character here shown) from the tax basis. It is only necessary to conclude, and we so hold, that although the Commissioner had the power under the circumstances of this case to compute the tax on the established wholesale price, he erred in failing to exclude the above described selling and advertising costs from the basis employed.

Other courts have spoken on situations similar to the one at bar. *Bourjois, Inc. v. McGowan*, D. C., 12 F. Supp. 787; *Id.*, 2 Cir., 85 F. 2d 510, certiorari denied, 300 U. S. 682, 57 S. Ct. 753, 81 L. Ed. 885; *Inecto, Inc. v. Higgins*, D. C., 21 F. Supp. 418; *Concentrate Mfg. Corp. v. Higgins*, 2 Cir., 90 F. 2d 439, certiorari denied, 302 U. S. 714, 58 S. Ct. 33, 82 L. Ed. 551; *Luzier's Inc. v. Nee*, D. C., 24 F. Supp. 608; *Id.*, 8 Cir., 106 F. 2d 130 and *Albrecht & Son v. Landy*, D. C., 27 F. Supp. 65. In the other cases the taxpayer did not prevail. In the instant case the taxpayer does prevail as to two points. We do not believe that our decision conflicts with the decisions in the other cases. But if a conflict does exist, we are not disposed to follow the other courts.

The pleadings in this case raised four points: (1) Tax incidence; (2) arm's length transaction; (3) tax basis; and (4) selling and advertising expenses. As to (1), (2) and (3) the District Court made findings of fact and rendered conclusions thereon. As to (4) the District Court made a finding of fact but did not render a conclusion thereon. The conclusion as to (1) is affirmed; the conclusions as to (2) and (3) are reversed. The finding as to (4) is supported by substantial evidence, and the District Court should render the appropriate conclusion thereon. This case is reversed and remanded with directions to proceed in accordance with this opinion.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

NO. 181

THE F. W. FITCH COMPANY, A CORPORATION,
Petitioner,

V.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

NO. 181

THE F. W. FITCH COMPANY, A CORPORATION,
Petitioner,

V.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the District Court (R. 15-23) is reported in 52 F. Supp. 292. The opinion of the Circuit Court of Appeals (R. 34-38) is reported in 141 F. (2d) 380.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 29, 1944. (R. 34) The petition for writ of certiorari was filed on the 26th day of June, 1944 and was granted October 9, 1944. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. Section 347).

QUESTION PRESENTED.

Whether Section 619(a) of the Revenue Act of 1932 (c. 209, 47 Stat. 169, 267; 26 U. S. C. A. Internal Revenue Acts, p. 618) authorized the deduction of advertising and selling expenses in computing the price upon which is based the manufacturers' excise tax imposed by Section 603 of the Act (c. 209, 47 Stat. 169, 261; 26 U. S. C. A. Internal Revenue Acts, p. 608).

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved will be found in Appendix A, *infra*, p. 29.

STATEMENT.

The material facts as found by the District Court are substantially as follows:

The F. W. Fitch Company, petitioner, is, and was, during the period from October 1, 1936 to June 30, 1939, a corporation existing under the laws of the State of Iowa. (R. 24) During such period the petitioner was subject to a manufacturers' excise tax under Section 603 and 619(a) of the Revenue Act of 1932. It was engaged in the manufacture and sale of cosmetics and toiletries which were subject to the manufacturers' excise tax, some at the rate of 10% and some at the rate of 5%. For said period the petitioner duly filed monthly manufacturers' excise tax returns, reporting thereon tax liability in the aggregate amount of $319,170.48 which was assessed and paid on the dates of filing of said monthly returns. (R. 24)

Petitioner divided its customers into five classifications, namely: barber and beauty supply dealers; chain and syndicate stores; customers purchasing a line of cosmetics known as "Beauty by Fitch"; wholesale and retail drug stores; and purchasers of special label merchandise. (R. 25) On sales

to drug wholesalers and to purchasers of special label merchandise, petitioner added the tax to the selling price and no refund thereof was claimed. (R. 26) A large proportion of petitioner's sales was made to the other classes of customers. All such sales were made at arm's length, and petitioner did not add the manufacturers' excise tax to the selling price but absorbed and bore the burden of same. (R. 25)

In arriving at the base upon which the tax was levied and assessed, the petitioner did not deduct from its selling price the amount expended in advertising and selling said products. The amount of selling and advertising expense chargeable to sales with respect to which petitioner absorbed and bore the burden of the tax and which were subject to excise tax at the rate of 5%, was the sum of $574,796.67. The amount of advertising and selling expense properly chargeable to such sales which were taxable at the rate of 10%, was the sum of $236,321.06. No part of this selling and advertising expense was deducted in calculating the excise tax paid on such sales. (R. 26)

The District Court for the Southern District of Iowa found and held that the above selling and advertising expenses were deductible in computing the selling price upon which the excise tax was based. Accordingly said court found that for the period from October 1, 1936 to and including June 30, 1939, petitioner paid the sum of $59,718.88 in excess of the amount of excise taxes owed by petitioner. (R. 27) Judgment for the overpayment, with interest, was entered August 10, 1943 for $79,028.77. (R. 28)

The Circuit Court of Appeals for the Eighth Circuit held that advertising and selling expenses are not deductible in computing the excise tax base under Section 619(a) of the Revenue Act of 1932. On March 28, 1944 said court reversed the judgment of the District Court remanding the case with directions to enter a judgment dismissing the petitioner's complaint. (R. 34-38)

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

(1) In holding that advertising and selling expenses are not deductible by a manufacturer of cosmetics and toilet preparations under Section 619(a) of the Revenue Act of 1932 in determining the sale price upon which the manufacturers' excise tax is to be levied and assessed under Section 603 of the Revenue Act of 1932.

(2) In holding that Section 619(a) of the Revenue Act of 1932 which authorized the exclusion of a "transportation, delivery, insurance, installation or other charge" in determining the sale price for the purpose of the tax, could not be construed as authorizing a manufacturer to deduct advertising and selling expenses as an "other charge".

(3) In holding that the rule of *ejusdem generis* must be applied to construe Section 619(a) of the Revenue Act of 1932 with respect to the phrase "or other charge".

(4) In any case, if the rule of *ejusdem generis* is to be applied, in failing to hold that Section 619(a) of the Revenue Act of 1932 divides the elements entering into the sales price upon which the tax is to be levied into two categories, i. e., manufacturing costs and distribution costs, and in holding that selling and advertising expenses are not such distribution costs as are specifically excluded by the Act.

(5) In holding that adoption of the Revenue Act of 1939, which provided that in determining the selling price of articles subject to the excise tax on toilet preparations, there should be excluded "* * * expenses of advertising and selling", indicated that it was not the understanding of the Congress which passed the Revenue Act of 1932, that advertising and selling expenses were deductible.

(6) In concluding that the legislative history of Section 619(a) of the Revenue Act of 1932 shows no clear congressional purpose to exclude advertising and selling costs in determining the price of articles subject to the excise tax.

(7) In reversing the decision of the District Court of the United States for the Southern District of Iowa and in remanding the cause with directions to dismiss petitioner's complaint.

SUMMARY OF ARGUMENT.

Section 603 of the Revenue Act of 1932 imposes a tax on manufacturers, equivalent to 10 per centum of the price for which sold, on cosmetics and kindred articles, and 5 per centum on toilet soaps and kindred articles. Subdivision (b) of Section 619 of the Act provides that where an article is sold, in a transaction other than at arm's length, the base upon which the tax is imposed shall be the price for which the article is sold in the ordinary course of trade by manufacturers or producers thereof.[1] Subdivision (a) of the same section provides that in determining the price upon which the tax is imposed, there shall be included in the price for which an article is sold, any charge for coverings and containers, and any charge incident to placing the article in condition packed ready for shipment but there shall be excluded from such price "a transportation, delivery, insurance, installation of other charge (not required by the foregoing sentence to be included)".[2]

Footnote 1.

Sec. 619(b) Revenue Act of 1932:

"If an article is—(1) sold at retail; (2) sold on consignment; (3) sold (otherwise than through an arm's length transaction) at less than the fair market price; the tax under this title shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Commissioner."

Footnote 2.

Sec. 619(a) Revenue Act of 1932:

"In determining, for the purposes of this title, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this title, whether or not stated as a separate charge. A transportation, delivery, insurance, installation or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations."

Where a manufacturer of toiletries and cosmetics sells the manufactured products, other than at arm's length, to a sales company, the tax on the manufacturer, under said subdivision (b) of Section 619, is based upon the selling price of the sales company, less its advertising and selling expense, i. e., the price for which such articles are sold in the ordinary course of trade by manufacturers or producers thereof. *Campana Corporation v. Harrison*, 111 Fed. (2d) 100. In holding that advertising and selling expenses are to be excluded from the selling price of the sales company, in determining the tax base for the manufacturer, the United States Circuit Court of Appeals for the Seventh Circuit in the *Campana case*, construed Section 619 as a whole. It included in its consideration both subdivisions (b) and (a) and in the light of the entire statute and the legislative history of the Act, concluded that Congress meant to exclude selling and advertising expenses from the tax base.

In the case at bar there was no intervening sales company as in the *Campana case, supra*, the taxpayer dealing directly with the consumer and bearing itself, all of the selling and advertising expenses incurred in the marketing of the products. Consequently, all of petitoner's transactions were at arm's length. The Circuit Court of Appeals for the Eighth Circuit failed to construe Section 619 as a whole, but confined itself to a restricted consideration of subdivision (a) of said section and by applying the rule of *ejusdem generis* concluded that charges for "transportation, delivery, insurance or installation" have little or no relation to selling and advertising expenses and hence ruled that such expenses are not deductible as an "other charge" in determining the tax base. (R. 31)

The meaning of neither subdivision (a) nor (b) can be ascertained without considering them together and constru-

ing Section 619 as a whole. When so considered, it appears that Congress intended to levy a tax on the manufacturer's wholesale price, including therein all manufacturing costs and excluding therefrom all non-manufacturing costs. The legislative history of the Act plainly indicates such intent. Advertising and selling expenses are non-manufacturing costs and are therefore excludable from the price as an "other charge" under Section 619(a).

ARGUMENT

The rule of Ejusdem Generis may not be applied to defeat the legislative intent shown by the statute as a whole.

The Circuit Court of Appeals for the Eighth Circuit disposed of this case by an application of the rule of *ejusdem generis* to one subdivision of Section 619 of the Revenue Act of 1932, without giving effect or consideration to the entire statute. The Court stated the problem as follows: (R. 36)

> "The words of § 619(a) which give rise to this controversy are the words 'or other charge' found in the second sentence of the section, which sentence, so far as pertinent, reads: 'A transportation, delivery, insurance, installation, or other charge * * * shall be excluded from the price * * *.' The appellee argues that the plain meaning of this language is that all nonmanufacturing costs are to be excluded by a manufacturer in determining selling price for the purposes of the excise tax. The government contends that no authorization for excluding advertising or selling expenses can reasonably be deduced from the words 'or other charge' in the light of their context or the legislative history of the statute."

After thus stating the problem, the Court in a very short opinion reached the following conclusion: (R. 36-37)

> "It seems clear to us that the words 'or other charge' must be taken and understood to mean 'or other like charge'. This because of the familiar rule of *ejusdem*

> *generis.* (*United States v. Gilliland*, 312 U. S. 86, 93.) We do not regard the expense of advertising and selling an article as being substantially similar to a charge for the transportation, delivery, insurance, or installation of the article sold. The charges expressly specified in § 619(a) to be excluded in determining the manufacturer's price for the purpose of the excise tax are not manufacturing costs, but they obviously have little or no relation to expenditures made by the manufacturer to create a market for or to sell his products."

The conclusion of the Court is subject to challenge not only because it gives no effect to the parenthetical phrase set out in subdivision (a) of Section 619, but also because it views said subdivision as a complete legislative enactment standing by itself, and without reference to the balance of the section or the object sought to be attained by the Act as a whole. However, the subdivision is not a complete statute, but is merely part and parcel of the entire Section 619. The meaning of any part of a statute cannot be ascertained without a consideration of the entire statute. Nowhere in its opinion does the Court refer to subdivision (b) of Section 619, and it therefore failed to construe the statute as a whole. Under subdivision (b) manufacturers not dealing at arm's length are taxed on the price for which articles are sold, in the ordinary course of trade, by manufacturers or producers thereof. That price, in the case of manufacturers selling to a wholly owned sales company, is the selling price of the sales company less its advertising and selling expenses. *Campana Corporation v. Harrison*, 111 Fed. (2d) 100. In the case at bar the Circuit Court of Appeals for the Eighth Circuit disagrees with the Circuit Court of Appeals for the Seventh Circuit in its construction of Section 619(a) in the *Campana case*. The latter Court had a problem directly under Section 619(b) (sales other than at arm's length being involved), and, in holding that advertising and selling expenses are deductible under Section 619(a), it considered and construed the statute as a

whole. In the instant case the Court made no attempt to ascertain the meaning of Section 619(b), evidently because sales here were at arm's length. However, the legislative meaning of neither Section 619(a) nor Section 619(b) can be ascertained without reference to, or consideration of, both subdivisions. Unless the subdivisions are construed together, taxpayers falling under one subdivision may be discriminated against in favor of taxpayers falling under the other subdivision.

This Court has announced the guiding rule for the construction of statutes and the application of the rule of *ejusdem generis* in *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84. The case not only contains a discussion of the rule of *ejusdem generis* but discusses generally the canons of statutory construction. The Revenue Act of 1926 provided that "interest on bonds, notes, or other interest-bearing obligations" should be included in gross income for income tax purposes. The taxpayer received a refund of income taxes theretofore paid, with interest thereon. It was the taxpayer's contention that such interest payment was not on an interest-bearing obligation within the meaning of the statute. The Court held that such interest was includible in gross income when effect to the statute as a whole was given; and the Court stated the applicable canons of construction.[1]

---

[1] Footnote.

"To ascertain the meaning of the words of a statute, they may be submitted to the test of all appropriate canons of statutory construction, of which the rule of ejusdem generis is only one. If, upon a consideration of the context and the objects sought to be attained and of the act as a whole, it adequately appears that the general words were not used in the restricted sense suggested by the rule, we must give effect to the conclusion afforded by the wider view in order that the will of the Legislature shall not fail. (p. 89)

* * *

"The intention of the lawmaker controls in the construction of taxing acts as it does in the construction of other statutes, and that intention is to be ascertained, not by taking the word or clause in question from its setting and viewing it apart, but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and

The Court in the instant case failed, however, to apply the rules of statutory construction laid down by this Court and confined itself to a restricted consideration of only a portion of the statute. The meaning of such portion can only be determined from a consideration of the entire statute as in the *Stockholms Case, supra.* A discussion of the statute is in a subsequent division hereof. It is hoped to demonstrate therein that the sense of the entire statute is to levy a tax on the manufacturers' wholesale price including all manufacturing costs therein but excluding all non-manufacturing costs, such as the distribution costs of selling and advertising. Assuming arguendo that such is the meaning of the statute as a whole, the Court below erred in applying the rule of *ejusdem generis* to subdivision (a) of Section 619, in such a way as to defeat that meaning. Effect to such meaning can only be given by interpreting the term in Section 619(b), "or other charge" as including advertising and selling expenses as exclusions from the price upon which the tax is based.

In applying the rule of *ejusdem generis*, the Circuit Court of Appeals failed to give any weight to the parenthetical phrase, 'not required by the foregoing sentence to be included'. If the true legislative intent was that determined by the Eighth Circuit through the application of the rule referred to, there would have been no need for the insertion of the parenthetical phrase. The use of that phrase immediately following the words 'other charge' obviously broadens the meaning of the last quoted words.

A transportation, delivery, insurance, or installation

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other appropriate tests for the ascertainment of the legislative will. (p. 93)

* * *

"The rule of strict construction is not violated by permitting the words of a statute to have their full meaning, or the more extended of two meanings. The words are not to be bent one way or the other, but to be taken in the sense which will best manifest the legislative intent." (p. 94)

charge is a charge not ordinarily attributable to the economic increment of manufacturing. An advertising charge, particularly where the advertising is directed to the ultimate consumer, as distinguished from advertising directed to a wholesaler, likewise is not in its essential nature a manufacturing charge. It is primarily distinguishable in character and is directed to the economic increment of time or place. It is an 'other charge' of the same class as transportation, delivery, insurance or installation in the sense that it *is* not a manufacturing charge and in the further sense, giving effect to the parenthetical phrase, that it is not a charge for coverings and containers being of such a nature as to place the product in a form ready for shipment 'at the factory or place of production'. Thus even if the rule of *ejusdem generis* were applied giving effect to the parenthetical phrase and to the obvious legislative intent hereinafter discussed, the result would be to allow the deduction of selling and advertising costs and expenses to the extent that such expenses are attributable solely to the economic function of distribution as distinguished from that of manufacture.

Later statutes may not be used as an aid in the interpretation of earlier statutory enactments.

The Circuit Court in the instant case also found weight for its conclusion in the Revenue Act of 1939, enacted June 29, 1939 (c. 247, Sec. 3(a), 53 Stat. 863; 26 U. S. C. A. Internal Revenue Acts, pages 1167-1168), wherein Congress provided that, in determining the selling price of articles subject to the manufacturers' excise tax on toilet preparations there should be excluded "a transportation, delivery, insurance, or other charge, and the wholesalers' salesmen's commissions and costs and expenses of advertising and selling", but made the amendment effective only with respect to sales made after the date of enactment of the Act.

Section 3 of the Revenue Act of 1939, amending Section 3401 of the Internal Revenue Code, provides (U. S. Code Current Service, 1939, No. 7, pp. 942-3):

> "Sec. 3. Toilet preparations tax amendments.
> (a) Section 3401 of the Internal Revenue Code (relating to the tax on toilet preparations) is amended by inserting at the end thereof the following new paragraphs: * * *
>
> 'Notwithstanding section 3111 (a), in determining, for the purpose of this section, the price for which an article is sold, whether at arm's length, or not, there shall be included any charge for coverings and containers of whatever nature, only if furnished by the actual manufacturer of the article, and any charge incident to placing the article in condition packed ready for shipment, only if performed by the actual manufacturer of the article, but there shall be excluded the amount of the tax imposed by this section, whether or not stated as a separate charge. Whether sold at arm's length or not, a transportation, delivery, insurance, or other charge, and the wholesalers' salesmen's commissions and *costs and expenses of advertising and selling* (not required by the foregoing sentence to be included), shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.'
>
> (b) The amendments made by subsection (a) shall be effective only with respect to sales made after the date of the enactment of this Act."

While subsection (b) of this statute provides that the amendments shall be effective only after the effective date of the Act (June 29, 1939), it is shown by the debates in Congress that the only change in the law was with respect to the inclusion or exclusion of the costs of coverings and containers in determining the sales price. Representative Cooper, a member of the Ways and Means Committee of the House, explaining the above quoted provision said (Congressional Record, Vol. 84, No. 126, p. 10964):

"Now the next amendment with respect to the excise tax on cosmetics makes provision for cases where one corporation supplies the containers—the bottles or boxes or whatever the product is put in—and another corporation provides the product itself—the powder or cream or whatever the product is. This makes provision for the deduction of the cost of the container, except in the case where the manufacturer of the product also manufactures the containers."

This was the entire comment on and explanation of the provision. The express language in the statute respecting the deduction of selling and advertising expenses is plainly a clarification of the existing law and not a change of law. *Helvering v. N. Y. Trust Co.*, 292 U. S. 455, 468. If there were any doubt as to the meaning of Section 619(a) of the Revenue Act of 1932, the language of Mr. Justice Butler speaking for the Court in the above cited case would be applicable (292 U. S. 468-9):

"Mere change of language does not necessarily indicate intention to change the law. The purpose of the variation may be to clarify what was doubtful and so to safeguard against misapprehension as to existing law."

See also *Jordan v. Roche*, 228 U. S. 436, at 445 and *Haggar Co. v. Helvering*, 308 U. S. 389, in which latter case this Court said (pp. 399-400):

"It must be assumed that Congress was aware through its committees of the change in the regulations which in 1936 had construed the statute as precluding an effective declaration in a timely amended return, and of the litigation then pending in this case and in *Glenn v. Oertel Co., supra*, in which the departmental construction had been challenged as 'unduly restrictive'. In the face of the legislative expression of dissatisfaction with the earlier statute as construed, Congressional purpose to declare that such was the intended meaning is not to be inferred merely from the fact that the amendment providing for the future said nothing as to the past. If we are to draw inferences it would seem

> as probable that Congress was content to leave the problems of the past to be solved by the courts where they were then pending, rather than to preclude their solution there. Action so ambiguous in its implications as to the past is wanting in that certainty and evident purpose which would justify its acceptance as a legislative declaration of what an earlier Congress had intended rather than an effort to make clear that which had been rendered dubious by unwarranted administrative construction."

In view of the foregoing the Court below was in error in concluding that the amendments of 1939 indicated that it was not the understanding of the Congress which made them that prior to June 29, 1939 advertising and selling costs were deductible in determining the selling price of an article subject to the excise tax.

Under a proper construction of Section 619 of the Revenue act of 1932, as a whole, advertising and selling expenses are deductible in determining the price upon which the manufacturers' excise tax is imposed by Section 603 of said act.

The decision of the Circuit Court of Appeals for the Eighth Circuit in this case, confining itself to a consideration of Section 619(a), alone, leaves the application of Section 619 in a state of confusion since it sheds no light on how taxpayers coming under Section 619(b) will be taxed without discrimination against taxpayers coming under Section 619(a). The decision of the Circuit Court of Appeals for the Seventh Circuit, on the other hand, in *Campana Corporation v. Harrison*, 114 Fed. (2d) 100, provides for a just and nondiscriminatory tax on taxpayers falling under either subdivision of said section. The latter Court did not confine itself to a consideration of Section 619 (b) only, but it considered Section 619 (a) as well and gave effect to the statute as a whole in ascertaining the legislative intent.

Section 603 of the Revenue Act of 1932 levied a tax on

the manufacturer, producer, or importer of toiletries and cosmetics. The tax was levied, not on the retail price, but on the manufacturers' wholesale price. As the Court said in the *Campana Case*, the manufacturers' price to the wholesaler was to be the starting point of tax computation. This "appeared again and again in the explanation of the bill. See Vol. 75, Congressional Record, pp. 5693, 5694, 5789 and 5901". 111 F. (2d) at 110. See also excerpts set out in Appendix B, of this Brief and Argument. "The Senate was told the same thing by its Committee on Finance. 'The manufacturer's excise tax proposal is to levy the tax once, upon the article in its finished state, but at its wholesale selling price, not at the retail price.' Senate Report #665; Vol. 75, Congressional Record, pp. 10085, 11361, 11657." 111 F. (2d) at 110.

Since it was the manufacturers' price to the wholesaler which was to be the starting point of the tax computation, the legislators must have realized that not all manufactured articles pass through the hands of wholesalers before reaching the consuming public. For example, the Campana Corporation sold its products to a single wholesale distributor, the Campana Sales Company, which bore all of the expenses of advertising and selling the products. As the Court points out in the *Campana Case*, this is a common practice among manufacurers of toilet articles. And, in all such cases, where the sales are at arm's length, the tax is imposed on the sale by the manufacturer to the single distributor, who constitutes the manufacturers' wholesale market, and no advertising or selling expenses are included in the price because the manufacturer has not incurred them. On the other hand, the petitioner, in the instant case, does not deal with a single distributor but incurs substantial sums for consumer advertising and selling directly to chain stores, drug stores, barber supply dealers, and the like. (R. 24-25) Obviously, the manufacturer who sells to a single distribu-

tor, incurring no advertising or selling expenses, would pay a much lesser tax than the advertising manufacturer who deals with many customers, unless the latter is permitted to exclude from the price at which the articles are sold the advertising and selling expenses.

In *Knowlton v. Moore*, 178 U. S. 41, this Court said at page 77:

> "Where a particular construction of a statute will * * * produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

In the *Campana Case, supra*, the Circuit Court of Appeals for the Seventh Circuit concluded that sales by the Campana Corporation to the Campana Sales Company were not at arm's length. Hence, the immediate problem was to ascertain the meaning of Section 619(b) which provides that in such cases the tax shall "be computed on the price for which such articles are sold, in the ordinary course of trade by manufacturers or producers thereof * * *". Section 619(b) did not provide how such a price would be determined. Obviously, there would be no standard or uniform prices, applicable generally, upon which to base the tax. The Commissioner was contending that sales by the manufacturing company to the sales company were not at arm's length, and that the tax to the manufacturing company should be based on the selling price of the sales company without diminution on account of selling and advertising expenses. The taxpayer was contending that transactions between it and the sales company were at arm's length, and that the tax should be measured by the actual price charged the sales company. The Court having concluded that sales between the two companies were not at arm's length, gave painstaking study to what the tax base should be. It considered the entire taxing Act, pointing out that the tax is on the manufacturer, producer, or im-

porter and not on the distributor or wholesaler. It found the legislative history of the Act replete with statements emphasizing that the tax was a manufacturers' tax based on the price to the wholesaler. It found that the framers of the bill did not intend the tax base to include costs other than the normal manufacturing costs and illustrated this by the following quotation from the Congressional Record: "Does the manufacturer's price that is contemplated include salesmen's commissions?" Mr. Crisp, acting chairman of the Committee on Ways and Means, answered that the "selling cost is not intended to be added". Vol. 75 Congressional Record p. 5693. The Court said (p. 110), "House Report No. 708 and Senate Report No. 665 plainly indicate that from the tax basis was to be excluded any charge having no connection whatever with the manufacturing process." Appendix B of this Brief and Argument sets out a number of pertinent quotations from the Congressional Record. At page 110 of its opinion the Court, in the *Campana Case*, said:

> "From the legislative history above related, it appears that (1) a manufacturer's tax was intended, (2) a price which would reflect normal manufacturing costs was to be the basis of the tax, and (3) the wholesale price adjusted if necessary to exclude non-manufacturing costs, ordinarily would be such a price. In this light the meaning of the statute becomes plain indeed."

And at page 111 the Court concludes as follows:

> "It is only necessary to conclude, and we do hold that although the Commissioner had the power under the circumstances of this case to compute the tax on the established wholesale price, he erred in failing to exclude the above described selling and advertising costs from the basis employed."

Other pertinent portions of the decision of the Circuit Court of Appeals for the Seventh Circuit in *Campana Corpora-*

tion v. Harrison, 111 Fed. (2d) 100 are set out in Appendix C, pp. 38-43.

It is very plain that when Congress said in Section 619(b) that in the case of articles "sold (otherwise than through an arm's length transaction) at less than the fair market price, the tax under this title shall (if based on the price for which the article is sold) be computed at the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Commissioner" it meant the manufacturers' price to the distributing wholesalers. So, in the *Campana Case*, the Court said that that price would be the sales company selling price less the advertising and selling expenses. What other price could it be? Certainly not the entire selling price of the sales company. The Court points out that a common practice among manufacturers of toilet preparations is to sell their output to a single wholesale agency which incurs the expenses of distribution. Hence, sales of such articles in the ordinary course of trade do not contain any element of distribution costs and the legislators obviously had this in mind in framing the Act.

Section 619(a) provides that the price for which an article is sold shall include "any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment". Plainly these are all manufacturing costs. The subdivision further provides that there shall be excluded from the price "a transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included)". Plainly these are all non-manufacturing costs. Here the statute divides the elements making up the price on which the tax is based into manufacturing and non-manufacturing costs. All of the former are included, and all of the latter are excluded. It requires no argument to demonstrate that advertising and selling expenses have

nothing to do with the manufacturing process and are non-manufacturing costs. Since the chairman of the Ways and Means Committee, *supra*, made definite answer to inquiry, when the Act was being considered, that it was not intended that selling expenses would be included in the price, there can be no doubt of the foregoing division of elements going into the price. Hence, if the rule of *ejusdem generis* is properly applied in this case, it would require a holding that advertising and selling expenses are similar to transportation, delivery, insurance, and installation charges, all of them being non-manufacturing costs.

Furthermore, it should be noted that the enumeration in Section 619(a) of "a transportation, delivery, insurance, installation or other charge" is immediately followed by a parenthetical phrase "(not required by the foregoing sentence to be included) shall be excluded * * *". The "foregoing sentence" referred to sets out the items which must be included in the price. They are all items which pertain to the manufacturing process. The implication of the parenthetical phrase is clear,—all items which do not pertain to the manufacturing process are to be excluded. The phrase is superfluous unless it has such meaning.

No reasonable or non-discriminatory application of Section 619, consistent with the meaning of the statute as a whole and the expressed purposes of the framers of the bill, can be made unless selling and advertising costs are excluded from the price upon which the tax is based for all subject taxpayers. Should the decision of the Court below stand, advertising manufacturers of toilet preparations, dealing at arm's length, would be taxed on a price which included all of the selling and advertising costs. Non-advertising manufacturers, and they are in the majority as the Court points out in the *Campana Case*, *supra*, having no selling and advertising costs, would be taxed on a much lesser price if their sales were at arm's length. If their

sales were not at arm's length their tax base would be something different again under Section 619(b). What it would be in such case is unpredictable unless the decision of the Circuit Court of Appeals for the Seventh Circuit in the *Campana Case* stands. However, to the extent that deduction of selling and advertising expenses is concerned, that case and the instant case would have to stand or fall together. If it were otherwise the manufacturer not dealing at arm's length would have selling and advertising expenses deducted, while the manufacturer whose sales were at arm's length would not have them deducted, a result obviously repugnant to established concepts in the application of tax laws. No uniformity can be achieved unless the fundamental division of the sales price made by Section 619(a) into manufacturing and non-manufacturing costs is recognized. When that is done there is no difficulty in applying the tax without discrimination—selling and advertising expenses are then excludable as non-manufacturing costs along with charges for transportation, delivery, insurance, and installation.

That it was the legislative intent that the statute should be applied uniformly without regard to sales methods is demonstrated beyond question in the discussion set forth in Appendix B of this brief which, among other things, quotes the following language of the Ways and Means Committee Report on the Revenue Bill of 1932 as follows:

> "It is of the utmost importance that the tax be imposed and administered uniformly and without discrimination. Each member of a competitive group must pay upon substantially the same basis as his competitors, even though his sales methods may differ. Consequently, the bill requires that every effort be made to ascertain the manufacturers' or producers' price at the place of manufacture or production."

Other courts have interpreted Section 619 of the Revenue act of 1932 and have considered the deductibility of selling and advertising costs in arriving at the price upon which the tax shall be based.

The petitioner relies primarily upon the case of *Campana Corporation v. Harrison*, 114 Fed. (2d) 400 (C. C. A. 7), discussed in the previous divisions of the brief. However, other Courts have considered the question and have expressed varying views.

In the case of *Bourjois, Inc. v. McGowan*, 12 F. Supp. 787, decided November 19, 1935, a similar question was presented to the Court. The Court held that the intercompany sales were not at arm's length, and that the basic price to be used in determining the amount of tax was the price received by the selling corporation. The taxpayer contended that even if this were true, it was entitled to deduct advertising and selling costs. The Court in consideration of this question stated:

> "As heretofore pointed out, Section 619 defines certain things to be included in the price and certain things which are or may be excluded. Packaging and charges incident to it are added. The amount of the tax is excluded. 'Transportation, * * * or other charge (not required by the foregoing sentence to be included) shall be excluded from the price, only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations. * * *" When the Act of 1932 was being considered in Congress, it was stated by the introducer that the selling cost was not intended to be added. This was in answer to an inquiry as to whether the manufacturer's price included salesmen's commissions. * * * What was meant by this declaration was that commissions of salesmen selling for the manufacturer in the ordinary way were not to be included. * * * To allow salesmen's commissions and costs and expenses of advertising and selling to be excluded from the sale price, the amount thereof under Section 619(a), *supra*, must be estab-

> lished to the satisfaction of the Commissioner, and that means there must be some basis on which a deduction can be made on account of such expenses. There is nothing in the record to show the amount of such commissions and costs or what the actual expenses were. We, therefore, are not required to determine whether any deduction should be made. The determination as made by the Commissioner without any proof of actual expense of sales is right."

While the Court in the above case did not hold that selling and advertising expenses were deductible, it indicated that they might be if they had been shown and proven. The Circuit Court of Appeals, in a review of the case, did not discuss the point. (85 Fed. (2d) 510.)

In *Luzier's, Inc., v. Nee*, 21 Fed. Supp. 608, (D. C., W. D. Mo., Reeves, J.) the District Court misconstrued the language of Representative Crisp and misconstrued the statute.[4] On appeal (100 Fed. (2d) 130 (C. C. A. 8)), the judgment below was affirmed on the sole ground that the finding of the Trial Court that the taxpayer had passed on the tax was supported by substantial evidence and would not be disturbed. The Circuit Court of Appeals did not discuss or pass on the question of the deduction of selling and advertising expenses.

The statute again came before the courts in *Ayer Co. v. United States*, 38 F. Supp. 284, decided April 7, 1941. The Court of Claims there concluded:

(1) Advertising expenditures have added value to tax-

Footnote 4. The Court said (24 Fed. Supp. 611):

"Counsel for the plaintiff calls attention to the Congressional Record of March 10, 1932, wherein an inquiry was made as follows: 'Does the manufacturer's price that is contemplated include salesmen's commissions?' An answer was returned as follows: 'The selling cost is not intended to be added. Now we are considering things like that and there will be other cases that will present themselves. Some committee amendments may be necessary.' It does not appear that the amendments as suggested by the inquiry and the answer were ever made. The act itself specifies what shall be included and what shall not be included in 'fair market price.' Commission of salesmen was not excluded from the fair market price."

payer's merchandise and therefore should not be deducted from its selling price.

(2) Section 3 of the Revenue Act of 1939 was not made retroactively effective. Therefore, it was not the intent of Congress to allow the deduction of advertising and sales expenses under Section 619(a) of the Revenue Act of 1932.

(3) Even under Section 3 of the Revenue Act of 1939, not all advertising and selling expenses were to be excluded but only wholesalers' expenses of advertising and selling.

The foregoing conclusions were reached in direct opposition to the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *Campana v. Harrison, supra.* Subsequent to the decision in the *Ayer Case*, which was rendered on April 7, 1941, the Circuit Court of Appeals for the Seventh Circuit reaffirmed its decision in *Campana v. Harrison*, 114 Fed. (2d) 100 in the case of *Campana v. Harrison*, 135 Fed. (2d) 234.

It is true that expenditures for advertising, by creating a demand for a manufacturer's merchandise and by giving it an added value in the mind of the purchasing public, enables the manufacturer, who expends large sums on consumer advertising, to obtain a higher price for his products. The *Ayer Case*, however, completely overlooks the fact that these are items of expense that may or may not increase the profit of the manufacturer. In the event selling and advertising expenditures do create an additional profit to the manufacturer, such profit is subject to the tax even if and after selling and advertising expenses are deducted. The Court of Claims seems to assume that advertising and selling expenses in themselves constitute profit, and that Court overlooks the fact that most of the increased selling price of advertised merchandise is expended on advertising and selling. If advertising and selling expenditures of the manufacturer are not deductible,

it penalizes the manufacturer who creates a market for his merchandise through national consumer advertising, because his tax per item of merchandise will be much greater than that of the manufacturer who does not advertise but sells his merchandise on the basis of a price appeal.

As authority for the proposition that advertising and selling expenses are not deductible because they increase the value of the merchandise advertised, the Court of Claims relies upon the decision by the Second Circuit Court of Appeals in *Bourjois, Inc. v. McGowan*, 85 Fed. (2d) 510. However, that case is not authority for the decision in the *Ayer Case* since, as previously pointed out herein, the Circuit Court of Appeals did not rule on the question because the advertising and selling expenses had not been shown.

As to the second reason given in the *Ayer* decision,—that is, that the amendment was not retroactive, we refer to the previous discussion herein with respect to this point.

The third basis for the decision in the *Ayer Case* was that even under Section 619(a) of the Revenue Act of 1932 as amended by Section 3 of the Revenue Act of 1939, manufacturers' advertising and selling expenses are not deductible but only the wholesalers' expenses of advertising and selling. This conclusion, reached by the Court of Claims in the *Ayer Case*, indicates a misconception of the meaning of Section 3 of the Revenue Act of 1939. Section 3 of the Act of 1939 reads in part: "Whether sold at arm's length or not, a transportation, delivery, insurance, or other charge, and the wholesaler's salesmen's commissions and costs and expenses of advertising and selling (not required by the foregoing sentence to be included), shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations." The Court of Claims stated in interpreting the foregoing section: "Note, moreover, that it was not all advertising and selling expenses that were to be excluded

under the Revenue Act of 1939; it was only the wholesaler's expenses of advertising and selling. Manufacturer's advertising and selling expenses are not mentioned. By implication they are to be included."

It is obvious that the word "wholesaler's" was intended to modify only the term "salesmen's commissions", and was not intended to modify or restrict the clause "and costs and expenses of advertising and selling". To adopt the construction placed upon this statute by the Court of Claims in the *Ayer Case* would be to allow the manufacturer, upon whom the tax is imposed, to deduct expenditures by his wholesalers for salesmen's commissions and costs and expenses of advertising and selling, but would be to disallow the manufacturer to deduct his own expenses of this type. Obviously, it was not intended by Congress, and it obviously is not the intent of the statute to allow the manufacturer upon whom the tax is imposed, to deduct a third party's expenses of advertising and selling, over which he had no means nor method of control or accounting.

It is a matter of common knowledge that the sales methods of manufacturers differ. Some manufacturers perform a manufacturing function only—their selling price is simply cost of production including materials, labor, and overhead, plus a margin of profit that allows them to realize a fair return on their capital investment. This type of manufacturing operation does not involve expenditures of large amounts for advertising and selling expenses to create a consumer demand for the merchandise produced. Such manufacturers sell their merchandise to distributing outlets who, themselves, through the expenditure of funds for advertising and selling, create the consumer demand.

Other manufacturers not only perform the actual function of producing merchandise, but create their own direct consumer demand through advertising and selling expenditures. Naturally the selling price of the merchandise pro-

duced by such a concern includes all of the items mentioned in the preceding paragraph, but their selling price also includes the cost and expense of advertising and selling and usually includes an additional margin of profit to compensate them for the hazard and for the additional capital investment that this method of operation requires.

The petitioner here utilizes the last described method of operation and not only manufactures merchandise but creates its own consumer demand by the expenditure of large sums for advertising and selling.

If the construction placed upon Section 619(a) of the Revenue Act of 1932 by the Court of Claims in the *Ayer Case, supra*, is to be adopted, it will result in a direct discrimination against those manufacturers who create their own consumer demand. Such construction not only requires such a manufacturer to pay a much greater tax, but allows them no advantage or benefit because of the additional hazard assumed and the additional funds risked in order to create sales. This hazard results from the success or failure of the advertising and sales program of such a manufacturer.

The legislative history of Section 619(a) of the Revenue Act of 1932 (discussed more fully in Appendix B, post) makes it clear, if any doubt or ambiguity exists as to the meaning and intent of that section, that it was intended that the selling price upon which the tax should be based should be reduced by the amount expended on advertising and selling. To argue that this construction is not correct is to contend that Congress, with full knowledge that sales methods differ as herein described, intended to impose a discriminatory tax. Certainly such an intent on the part of Congress cannot be assumed or inferred, particularly in view of the statement contained in the Ways and Means Committee Report that it is "of utmost importance that the tax is imposed and administered uniformly

and without discrimination", even though the sales methods of a taxpayer may differ from that of his competitors.

As stated by the Ways and Means Committee Report on the Revenue Act of 1932 (No. 708), the tax was intended to "be imposed upon the producer's price—that is, cost of production plus a reasonable (and uniform) return upon the value of the properties devoted to production". Such a producer's price can only be arrived at by deducting from the actual selling price all costs and expenses of distribution and advertising and selling.

All of the foregoing point definitely to the following conclusion: The price upon which the tax was intended to be imposed was to be the actual selling price of the manufacturer less costs and expenses of distribution, advertising and selling.

The tax laws are to be liberally construed in favor of the taxpayer.

The Circuit Court in the case at bar ignored the familiar rule frequently announced by this court that the tax laws are to be construed in favor of the taxpayer. Doubts are to be resolved against the government and in favor of the taxpayer. *Burnet v. Niagara Brewing Co.*, 282 U. S. 648; *Bowers v. New York & Albany Lighterage Co.*, 273 U. S. 346; *Eidman v. Martinez*, 184 U. S. 578; *Shwab v. Doyle*, 258 U. S. 529.

"Taxation is an intensely practical matter, and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences." *Farmers Loan & Trust Co. v. State of Minnesota*, 280 U. S. 204, 212. The more reasonable interpretation will be preferred to one producing inequality and injustice. *Knowlton v. Moore*, 178 U. S. 41, 77.

CONCLUSION.

The decision below should be reversed.

ARNOLD F. SCHAETZLE,
JAMES M. STEWART,
Counsel for Petitioner.

November, 1944.

APPENDIX A.

Revenue Act of 1932, c. 208, 47 Stat. 169:

SEC. 603. TAX ON TOILET PREPARATIONS, ETC.

There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which sold: Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, tooth and mouth washes (except that the rate shall be 5 per centum), dentifrices (except that the rate shall be 5 per centum), aromatic cachous, toilet soaps (except that the rate shall be 5 per centum), toilet powders, and any similar substance, article, or preparation, by whatsoever name known or distinguished; any of the above which are used or applied or intended to be used or applied for toilet purposes.

SEC. 619. SALE PRICE.

(a) In determining, for the purposes of this title, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this title, whether or not stated as a separate charge. A transportation, delivery, insurance, installation or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

(b) If an article is—

(1) sold at retail;
(2) sold on consignment;
(3) sold (otherwise than through an arm's length transaction) at less than the fair market price;

the tax under this title shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Commissioner.

APPENDIX B.

ANALYSIS OF THE STATUTE IN THE LIGHT OF ITS LEGISLATIVE HISTORY.

1. The legislative intent is expressed in the Ways and Means Committee Report on the Revenue Bill of 1932.

Section 619 of the Revenue Act of 1932 contains substantially the same provisions (except for certain licensing provisions not here material) which were contained in Section 601 of the 1932 Revenue Bill as reported to the House by the Ways and Means Committee. The bill as passed by the House eliminated Section 601, substituting two short sections (Section 617 which covered retail sales—formerly covered by 601(c) of the bill as reported out by the Committee—and Section 618 which covered sales for less than fair market price—601(b) of the Committee bill.

Section 606 of the bill as reported by the Senate Finance Committee was the same as what ultimately became Section 619 of the Act. As passed by the Senate, Section 606 became Section 619 without change. Section 619 of the bill as passed by the Senate was agreed to by the Committee of Conference and thus became Section 619 of the Act.

Subdivision (a) of Section 619 of the Act contained the same phraseology as Section 601(a) of the Bill reported to the House by the Ways and Means Committee.

Subdivision (b)(1) of the Act was substantially the same as Section 601(c) of the Bill reported out by the Ways and Means Committee and Section 617 of the Bill as passed

by the House, although there was some change in the phraseology.

Subdivision (b)(2) of the Act is the same as Section 604(b) of the Bill as reported out by the Ways and Means Committee.

Subdivision (b)(3) of Section 619 of the Act is similar to Section 604(g)(3) and 604(h) of the Bill as reported out by the Ways and Means Committee and is almost identical with Section 618 of the Bill as passed by the House.

The report of the Senate Finance Committee on the Revenue Bill of 1932 (Senate Report No. 665) does not comment at length on the legislative intent; but the Ways and Means Committee Report goes into the matter in great detail. We therefore turn to the Ways and Means Committee Report on the Revenue Bill of 1932 (H. R. Report No. 708, Seventy-second Congress, First Session, Union Calendar No. 123, March 18, 1932) for an expression of the legislative intent.

2. The legislative intent was to impose the tax upon the fair manufacturers' price "at the factory or place of production".

The Ways and Means Committee Report states:

> "* * *, the bill requires that every effort be made to ascertain the manufacturers' or producers' price at the place of manufacture or production." (p. 180) *
>
> "Section 604 provides rules which determine the sale price which is the basis of the tax. In general, this should be the manufacturer's or producer's price at the factory or place of production." (p. 183)
>
> "Provision is made in various cases that the tax shall be on the 'fair manufacturer's price,' which under subsection (b) is the price for which manufacturers or producers of like articles would ordinarily sell the article—in short, the normal factory price—as determined by the Commissioner." (p. 184)

* Page references are those contained in the reprint of the report contained in Internal Revenue Bulletin, Cumulative Bulletin 1939-1 (Part 2).

The legislative intent is clearly expressed. The tax was intended to be imposed in general upon the manufacturer's or producer's price *at the place of manufacture or production.*

3. The intent was to impose the tax upon a competitively uniform basis regardless of differing sales methods.

The Committee Report states:

"UNIFORM APPLICATION OF TAX.

"It is of the utmost importance that the tax be imposed and administered uniformly and without discrimination. *Each member of a competitive group must pay upon substantially the same basis as all his competitors, even though his sales methods may differ.* Consequently, the bill requires that every effort be made to ascertain the manufacturers' or producers' price at the place of manufacture or production." (p. 180) (Italics added.)

The Report also states:

"It is expected that the officials in charge of the administration of the tax will confer with representatives of each particular industry and with groups of taxpayers confronted with similar problems, and reach an agreement with them as to the methods by which the amount of their tax liability is computed. A principle agreed on in this manner shall be applied uniformly to each member of the industry or group, whether or not he participated in the conference. Severe and justified criticism may be expected whenever one manufacturer is permitted to pay a lesser tax than his competitor." (p. 180)

From the foregoing it is clear that the intent was "that each member of a competitive group must pay upon substantially the same basis as all his competitors, even though his sales methods may differ."

What are the different sales methods referred to?

(a) Some manufacturers confine their efforts solely to

manufacture, selling their product or products at arm's length to distributors. *Weco Products Co. v. Harrison* (D. Ct. Ill.—1942) 42-2 USTC 9760, 30 AFTR 1746; *Williams v. Harrison* (C. C. A. 7), 110 F. 2d 989; *Marchand Co. v. Higgins* (C. C. A. 2) 124 F. 2d 433. In such cases the tax is imposed on the manufacturer's sales price at the factory or place of production; and the economic function of distribution which is carried on by the purchaser, (distributor) together with the profit accruing to the distributor by reason of such distribution, is not subjected to the manufacturer's excise tax.

(b) A second sales method frequently employed is the sale by a manufacturer to a selling or distributing agency or affiliate controlled by the manufacturer, as *Campana Corporation v. Harrison*, (C. C. A. 7), 114 F. (2d) 400. In such case, the Committee Report states the tax should be imposed not upon the affiliate's sales price, but upon the fair inter-company price. The Committee Report states (p. 184):

> "Third, provision is made for transactions in which, by reason of the relationship of the parties, the price charged does not represent a fair value arrived at by an arm's-length sale. For example, a manufacturer may transfer his product to a selling agency controlled by him, at a bookkeeping price below market value. Or a manufacturing corporation may sell plant equipment to an affiliated concern at an arbitrary price. It is essential that in such cases the tax be imposed on the same value as in the case of similar sales between independent parties."

The policy expressed in the last quoted portion of the Committee Report was a distinct departure from the policy contained in the last preceding manufacturers' excise tax statute. Under the provisions of Section 601(a) of the Revenue Act of 1926 the sales tax was imposed not upon the fair inter-company price, but upon the price at which

the affiliated sales company made its sale. Section 601(a) of the Revenue Act of 1926 provided:

> "Sec. 601(a). If any person who manufactures, produces, or imports any article enumerated in section 600, sells or leases such articles to a corporation affiliated with such person within the meaning of section 240 of this Act, at less than the fair market price obtainable therefor, the tax thereon shall be computed on the basis of the price at which such article is sold or leased by such affiliated corporation."

If Congress had intended that under the 1932 Act, the tax should be imposed upon the affiliated sales company's selling price, it would have said so and would not have said to the contrary in that portion of the Committee Report on the 1932 bill quoted above. Congress was fully conversant with the practice of inter-company sales to selling agencies. Such was pointed out in the Commissioner's ruling reported as S. T. 617 construing this provision and published shortly after the enactment of the Revenue Act of 1932. Cumulative Bulletin XI-2, C. B. 513, July-December, 1932, wherein the Commissioner stated:

> "Under section 607 of the Act a tax is imposed upon sales made by the manufacturer and under section 619 a method is provided for ascertaining the fair market price upon which the tax shall be computed in those cases where the interests of the vendor and vendee may be the same. Section 619(b) (3) is undoubtedly intended to prevent the avoidance of taxes which would easily be possible without its presence in the law. Congress apparently foresaw the probability of the creation of corporations having identical interests, one as the manufacturer and the other as the distributing agency, and sought to impose the tax on the full manufacturer's sales price where the manufacturing corporation sold to the distributing corporation at a nominal price. There are numerous other instances where similar mutual interest could operate to the disadvantage of the Government. Viewing the statute in this light, it must be presumed that Congress did not in-

tend to have two or more affiliated corporations recognized as a single entity for manufacturers' excise tax purposes. If it had so intended it seems reasonable to believe that some provision would have been made in the statute for such recognition. That no such provision was made, coupled with the fact that transactions not at arm's length are specifically provided for, leads to the conclusion that the intent was to impose a tax on all sales between such corporations.

That Congress had full knowledge of the conditions existing with reference to affiliated corporate groups is further established by the fact that in the income tax law special provisions appear relating to such groups, under which they are authorized to file consolidated returns. The general laws recognize corporations as separate entities and in the absence of special legislation, such as is incorporated in the income tax provisions of the Act relating to affiliated groups, each corporation, as a separate legal entity, must file a separate return for the purpose of the excise tax.

The contention that the statute should be interpreted to mean the 'economic manufacturer', rather than the legal entity, can not be supported either by the language of this particular statute or by the general law relating to corporations. In the absence of specific provisions to the contrary, wherever a statute has spoken of a corporation it has always been interpreted to mean a single legal entity."

To the same effect was informal ruling No. 33 promulgated shortly after the passage of the Revenue Act of 1932 in response to inquiries from toilet goods manufacturers. In this ruling the Commissioner stated:

"Question: The manufacturer makes the goods and owns the trade-mark but confines his activities to manufacturing solely. He sells his entire output to a distributing company, which may or may not be a subsidiary. In this case does the manufacturer pay the tax?"

"Ruling: The fact that the entire output of a fabricator is marketed through a single distributor, even though one is a subsidiary of the other, does not, *per se*,

affect the tax liability. However, attention is invited to the provisions of section 619(b) of the Act." (Informal Ruling No. 33, dated Aug. 2, 1932; 1932 C. C. H. Fed. Tax Service, Vol. 2, p. 2328.)

From the foregoing it is clear that in the case of a sales method where a manufacturer sold to an affiliated selling and distributing corporation the tax was to be imposed upon the fair manufacturer's price "at the place of manufacture or production".

(c) The third sales method commonly employed in the toilet goods industry is that in which the manufacturer carries on not only the economic function of manufacture, but also the entirely separate function of distribution and sale.

Petitioner comes within this group.

If Congress intended what it *said* that it intended, it intended that in all three such groups within a given competitive field the tax should be imposed upon substantially the same basis.

That could not possibly be done unless the tax is imposed, in each case, upon a price substantially equivalent to the manufacturer's price "at the factory or place of production". Unless the tax is so administered "each member of a competitive group" will *not* "pay upon substantially the same basis as all his competitors, even though the sales methods may differ". (See p. 180, Committee Report No. 708, *supra*)

Unless the tax is so administered, it would be imposed, in the case of the manufacturer such as petitioner which employs the sales method under which it acts as its own distributor, upon his sales price as distributor. Such a sales price, particularly in the case of nationwide distribution of nationally advertised toilet products, is tremendously in excess of the fair manufacturer's price at the factory or place of production. This is true because the advertising

(directed primarily to consumer demand) and other selling costs and expenses attributable solely to the economic function of distribution must be recouped in the selling price of the distributor. Otherwise it could not function in a competitive economic field.

That the legislative intent was not to discriminate against manufacturers who employed such sales methods, is indicated not only from the portions of the Committee Report quoted above, but also by the statement of Representative Crisp, the member of the Ways and Means Committee who had charge of the bill on the floor of the House. During the consideration of the bill, Representative Harlan asked: "Does the manufacturers' price that is contemplated include salesmen's commissions?" In his answer Mr. Crisp stated unequivocally: "The selling cost is not intended to be added." (Congressional Record, Vol. 75, Part 5, 72nd Congress, First Session, page 5693.)

All of the foregoing point definitely toward the view:

(1) That the price upon which the tax was intended to be imposed was the normal factory price at the place of manufacture or production.

(2) That where sales were made by a manufacturer to a controlled distributor at less than the normal factory price, the tax was to be imposed not upon the distributor's sales price (as was the scheme under the 1926 Act) but rather upon the price that would have prevailed between manufacturer and distributor had the distributor been entirely independent.

(3) That in those cases where the manufacturer did not sell to an exclusive distributor, but acted as his own distributor, the manufacturer's sales price (as distributor) should be reduced by his distributing costs and expenses in order to tax him only upon his fair manufacturer's price. Only in that way could the tax be imposed uniformly as between manufacturers using these different sales methods.

Only by interpreting the statute in that manner can the parenthetical phrase "(not required by the foregoing sentence to be included)" contained in Section 619(a) be given effect so as to carry out the legislative intent.

APPENDIX C.

Pertinent Portions of the Decision in

Campana Corporation v. Harrison,
111 F. (2d) 100,

Circuit Court of Appeals, Seventh Circuit
August 14, 1940.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division; Philip L. Sullivan, Judge.

Action by the Campana Corporation against Carter H. Harrison, individually and as Collector of Internal Revenue for the First Collection District of Illinois, to recover additional manufacturer's excise taxes paid under protest. From a judgment for plaintiff, the defendant appeals.

Reversed and remanded, with directions.

Before MAJOR, TREANOR, and KERNER, Circuit Judges.

KERNER, Circuit Judge.

This is an action brought against the revenue collector for the United States to recover additional manufacturer's excise taxes paid under protest. The plaintiff filed its Manufacturer's excise tax return under the law and paid the tax. Revenue Act of 1932, 47 Stat. 259, ch. 209, secs. 601, *et seq.*, 26 U. S. C. A. Int. Rev. Acts, page 663, *et seq.* Then the Commissioner of Internal Revenue assessed an additional tax and this tax the taxpayer paid under protest. Timely application for a refund of the additional amount paid was made and denied. Thereupon the taxpayer sued

in the District Court and the Court (sitting without a jury) found for the taxpayer. The defendant Collector appealed to this Court seeking a reversal of the judgment.

Campana Corporation is engaged in the manufacture and sale of a toilet preparation or cosmetic known as "Campana's Italian Balm," with its principal place of business at Batavia, Illinois. Since the date of the taxing statute (June 21, 1932) this face and hand lotion has been subject to a manufacturer's excise tax equivalent in amount to 10% of "The price for which so sold." Section 603 of the Revenue Act of 1932. The statute requires monthly tax returns and payments, and in the instant case the tax month in controversy is July, 1933.

Campana Corporation was organized in 1926 and prior to July 1, 1933 was engaged both in the manufacture and the distribution (including advertising and sales promotion) of "Campana's Italian Balm." On July 1, 1933, a contract for the exclusive distribution and sale of Campana's Italian Balm went into effect. By this sales contract the Campana Corporation agreed to sell its product exclusively to E. M. Oswalt (60% stockholder of Campana Corporation) or his corporate transferee. As sales price for the product Oswalt agreed to pay an amount equal to the cost of production of the article plus 39% of this cost. Then Oswalt organized the Campana Sales Company and on July 1, 1933 transferred the sales contract to it.

* * *

Tax Basis. * * *

When the manufacturers' excise tax bill was reported out of the Committee on Ways and Means, it was explained to the many Representatives on the floor of the House, Mr. Crisp, acting Chairman of the Committee, emphasized that the tax was a manufacturer's tax levied not on the retail price but on the manufacturer's wholesale price. That the manufacturer's price to the wholesalers was to be the

starting point of tax computation, appeared again and again in the explanation of the bill. See Vol. 75, Congressional Record, pp. 5693, 5694, 5789 and 5904. The Senate was told the same thing by its Committee on Finance. "The manufacturer's excise tax proposal is to levy the tax once, upon the article in its finished state, but at its wholesale selling price, not at the retail price." Senate Report #665; Vol. 75, Congressional Record, pp. 10885, 11361, 11657.

However, the legislators realized that not all manufactured articles passed through the hands of the wholesalers before reaching the consuming public. In these situations the legislators intended the tax basis to be the wholesale price if that price could be established. Nor did they intend the tax basis to include costs other than the normal manufacturing costs. For instance, to the question "Does the manufacturer's price that is contemplated include salesmen's commissions?" Mr. Crisp answered that the "Selling cost is not intended to be added." Vol. 75, Congressional Record, p. 5693. On this point House Report #708 and Senate Report #665 plainly indicate that from the tax basis was to be excluded any charge having no connection whatever with the manufacturing process.

From the legislative history above related, it appears that (1) a manufacturer's tax was intended, (2) a price which would reflect normal manufacturing costs was to be the basis of the tax, and (3) the wholesale price adjusted if necessary to exclude non-manufacturing costs, ordinarily would be such a price. In this light the meaning of the statute becomes plain indeed. Sec. 603 imposes upon cosmetics and toilet preparations "sold by the manufacturer . . . a tax equivalent to 10 per centum of the price for which so sold." Sec. 619(b), 26 U. S. C. A. Int. Rev. Code Section 3111(b), provided that if an article is sold at retail, on consignment, or at less than the fair market price and otherwise than through an arm's length transaction,

then the tax "shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof * * *." And Sec. 619(a) provides that in "determining * * * the price for which an article is sold, there shall be included any charge * * * incident to placing the article in condition packed ready for shipment * * *. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price * * *."

In interpreting Sec. 619(a) of the statute the Treasury Department stated that "charges which have no connection with the manufacturing process * * * are to be excluded in computing the tax." Article 12 of Regulation 46, promulgated under the Revenue Act of 1932. In this connection it is to be noted that in 1939 Congress deleted the second sentence of Section 619 (a) and substituted the following: "Whether sold at arm's length or not, a transportation, delivery, insurance, or other charge, and the wholesaler's salesmen's commissions and costs and expenses of advertising and selling (not required by the foregoing sentence to be included), shall be excluded from the price * * *." 53 Stat. 862, 863, 26 U. S. C. A. Int. Rev. Code Section 3401. No legislative comment or explanation was given for the 1939 change.

It follows from what has been said that the taxpayer has failed to comply with the statute and that the Commissioner was justified under the circumstances in computing the tax on the wholesale price. We conclude therefore that the District Court erred in holding that the intercompany price represented the tax basis; its findings in this respect do not support the conclusion rendered thereon.

Selling and advertising costs. One more subject remains to be discussed. The selling and advertising expenses of

the selling corporation which pertain exclusively to the nation-wide process of marketing and distributing the taxable product are not manufacturing costs. The evidence is that the selling corporation sells to wholesalers by promising that it will "sell what the wholesaler buys," and that the selling corporation does this very thing, in effect selling the taxable article three times over. In this regard the taxpayer's complaint alleges that the "Commissioner erred in failing to reduce the price at which Campana Sales Company sold said articles by advertising and selling costs and expenses paid or incurred by said Campana Sales Company during July, 1933, in determining the price of articles subject to tax under the provisions of Section 603 of the Revenue Act of 1932."

At the trial the taxpayer adduced evidence which showed, and the District Court so found, that the selling and advertising costs of the Campana Sales Company amounted to $29,792.05 for July of 1933. In our discussion of the statute we stated that non-manufacturing charges were to be excluded in computing the tax. Further discussion would not add more than what was said there: the statute directs the exclusion of the selling and advertising costs (of the character here shown) from the tax basis. It is only necessary to conclude, and we so hold, that although the Commissioner had the power under the circumstances of this case to compute the tax on the established wholesale price, he erred in failing to exclude the above described selling and advertising costs from the basis employed.

Other courts have spoken on situations similar to the one at bar. *Bourjois, Inc. v. McGowan*, D. C., 12 F. Supp. 787; *Id.*, 2 Cir., 85 F. 2d 510, certiorari denied, 300 U. S. 682, 57 S. Ct. 753, 81 L. Ed. 885; *Inecto, Inc. v. Higgins*, D. C., 21 F. Supp. 118; *Concentrate Mfg. Corp. v. Higgins*, 2 Cir., 90 F. 2d 139, certiorari denied, 302 U. S. 714, 58 S. Ct.

33, 82 L. Ed. 551; *Luzier's Inc. v. Nee*, D. C., 24 F. Supp. 608; *Id.*, 8 Cir., 106 F. 2d 130 and *Albrecht & Son v. Landy*, D. C., 27 F. Supp. 65. In the other cases the taxpayer did not prevail. In the instant case the taxpayer does prevail as to two points. We do not believe that our decision conflicts with the decisions in the other cases. But if a conflict does exist, we are not disposed to follow the other courts.

The pleadings in this case raised four points: (1) Tax incidence; (2) arm's length transaction; (3) tax basis; and (4) selling and advertising expenses. As to (1), (2) and (3) the District Court made findings of fact and rendered conclusions thereon. As to (4) the District Court made a finding of fact but did not render a conclusion thereon. The conclusion as to (1) is affirmed; the conclusions as to (2) and (3) are reversed. The finding as to (4) is supported by substantial evidence, and the District Court should render the appropriate conclusion thereon. This case is reversed and remanded with directions to proceed in accordance with this opinion.

No. 181

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE F. W. FITCH COMPANY, A CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 15) is reported at 52 F. Supp. 292. The opinion of the Circuit Court of Appeals (R. 34) is reported at 141 F. (2d) 380.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 29, 1944 (R. 38). The petition for a writ of certiorari was filed on June 21, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 619 (a) of the Revenue Act of 1932 and Section 3441 (a) of the Internal Revenue Code require that a manufacturer's advertising and selling expenses be excluded from its selling prices in computing the tax imposed by Section 603 of the Revenue Act of 1932 and Section 3401 of the Internal Revenue Code.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 5–7.

STATEMENT

During the period from October 1, 1936, to June 30, 1939, the petitioner was subject to the excise tax imposed upon manufacturers of toilet articles. In computing its tax for this period the petitioner determined selling prices without excluding therefrom any amount of its advertising and selling expenses. (R. 26.) The petitioner subsequently filed a claim for refund of a portion of the tax paid on articles sold by it to certain customers, on the ground that the selling and advertising expenses attributable to those articles should have been excluded from the selling prices in computing the tax. (R. 24, 25.) The claim was rejected, and the petitioner filed suit against the United States in the District Court, which held after trial (R. 15) that such expenses should have been excluded, and that the petitioner was therefore entitled to a re-

fund of $59,718.88 for taxes paid and not passed on. Judgment was entered accordingly (R. 28), but on appeal the Circuit Court of Appeals for the Eighth Circuit held that the exclusion was erroneous and reversed the judgment of the District Court (R. 38).

DISCUSSION

The tax involved here is measured by the prices at which the manufacturer sold the taxable articles. Section 603 of the Revenue Act of 1932 (Appendix, *infra*); Section 3401 of the Internal Revenue Code (Appendix, *infra*). The statute provides, however, that there should be excluded from the amount of the selling price a "transportation, delivery, insurance, installation, or other charge * * *." Section 619 (a) of the Revenue Act of 1932 (Appendix, *infra*); Section 3441 (a) of the Internal Revenue Code. The Circuit Court of Appeals held that this provision did not include advertising and selling expenses of the manufacturer. While we believe the decision below to be correct, we agree with the petitioner that the ruling is in conflict with the decisions of the Circuit Court of Appeals for the Seventh Circuit in *Campana Corp.* v. *Harrison*, 114 F. (2d) 400, and *Campana Corp.* v. *Harrison*, 135 F. (2d) 334.

The importance of the question involved in this and the *Campana* cases is clear. While the effect of the exclusion provision was altered, insofar as

it applied to the excise tax on manufacturers of toilet articles, by Section 3 of the Revenue Act of 1939 (Appendix, *infra*), and the excise tax on such manufacturers was terminated as of October 1, 1941, by Section 552 (b) of the Revenue Act of 1941, c. 412, 55 Stat. 687, there are pending, however, numerous cases in which liability for a very large total amount of tax asserted against manufacturers of toilet articles is disputed on the grounds taken by the taxpayers in these cases. Moreover, the exclusion provision is still in effect, without amendment, as Section 3441 (a) of the Internal Revenue Code, with respect to excise taxes on manufacturers of such products as automobiles, radio receiving sets, refrigerators, sporting goods, and firearms. Sections 3401–3407 of the Internal Revenue Code, as amended.

CONCLUSION

In view of the conflict of decisions, and of the manifest importance of the question involved, we do not oppose the issuance of a writ.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
Special Assistants to the Attorney General.

JULY 1944.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 603. TAX ON TOILET PREPARATIONS, ETC.

There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, tooth and mouth washes (except that the rate shall be 5 per centum) dentifrices (except that the rate shall be 5 per centum), tooth pastes (except that the rate shall be 5 per centum), aromatic cachous, toilet soaps (except that the rate shall be 5 per centum), toilet powders, and any similar substance, article, or preparation, by whatsoever name known or distinguished; any of the above which are used or applied or intended to be used or applied for toilet purposes.

SEC. 619. SALE PRICE.

(a) In determining, for the purposes of this title, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this title, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be

excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

Internal Revenue Code:

SEC. 3401. TAX ON TOILET PREPARATIONS, ETC.

There shall be imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, aromatic cachous, toilet powders, and any similar substance, article, or preparation, by whatsoever name known or distinguished; any of the above which are used or applied or intended to be used or applied for toilet purposes.

(26 U. S. C., Sec. 3401.)

Section 3441 (a) of the Internal Revenue Code (26 U. S. C., Sec. 3441) is substantially the same as Section 619 (a) of the Revenue Act of 1932.

Revenue Act of 1939, c. 247, 53 Stat. 862:

SEC. 3. TOILET PREPARATIONS TAX AMENDMENTS.

(a) Section 3401 of the Internal Revenue Code (relating to the tax on toilet preparations) is amended by inserting at the end thereof the following new paragraphs:

* * * * * *

"Notwithstanding section 3441 (a), in determining, for the purpose of this section, the price for which an article is sold, whether at arm's length or not, there shall

be included any charge for coverings and containers of whatever nature, only if furnished by the actual manufacturer of the article, and any charge incident to placing the article in condition packed ready for shipment, only if performed by the actual manufacturer of the article, but there shall be excluded the amount of the tax imposed by this section, whether or not stated as a separate charge. Whether sold at arm's length or not, a transportation, delivery, insurance, or other charge, and the wholesaler's salesmen's commissions and costs and expenses of advertising and selling (not required by the foregoing sentence to be included), shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations."

(b) The amendments made by subsection (a) shall be effective only with respect to sales made after the date of the enactment of this Act.

U. S. GOVERNMENT PRINTING OFFICE: 1944

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BRIEF FOR THE UNITED STATES

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The opinion of the District Court (R. 15) is reported at 52 F. Supp. 292. The opinion of the Circuit Court of Appeals (R. 34) is reported at 141 F. (2d) 380.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 29, 1944. (R. 38.) The petition for a writ of certiorari was filed on June 21, 1944, and was granted on October 9, 1944. (R. 40.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 619 (a) of the Revenue Act of 1932 and Section 3441 (a) of the Internal Revenue Code require that a manufacturer's advertising and selling expenses be excluded from its selling prices in computing the excise tax imposed by Section 603 of the Revenue Act of 1932 and Section 3401 of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

These are set forth in Appendix A, *infra*, pp. 21–26.

STATEMENT

During the period from October 1, 1936, to June 30, 1939, the petitioner was subject to the excise tax imposed upon manufacturers of toilet articles. In computing its tax for this period the petitioner determined selling prices without excluding therefrom any amount of its advertising and selling expenses. (R. 26.) The petitioner subsequently filed a claim for refund of a portion of the tax paid on articles sold by it, on the ground that the selling and advertising expenses attributable to those articles should have been excluded from the selling prices in computing the tax. (R. 24, 25.) Neither in its claim for refund nor at any other stage in the case has the petitioner asserted that any sale was at retail. The claim for refund was rejected, and the petitioner filed suit against the United States in the District Court, which held after trial (R. 15) that such expenses

should have been excluded, and that the petitioner was therefore entitled to a refund of $59,718.88 for taxes paid and not passed on. Judgment was entered accordingly (R. 28), but on appeal the Circuit Court of Appeals for the Eighth Circuit held that the exclusion was erroneous and reversed the judgment of the District Court (R. 34–38).

SUMMARY OF ARGUMENT

Section 603 of the Revenue Act of 1932 imposed on toilet preparations sold by the manufacturer or producer an excise tax equivalent to stated percentages "of the price for which so sold." Section 619 provided for computing the amount of the sales price of a number of articles subject to excise taxes under various sections of Title IV of the Revenue Act of 1932, including Section 603. Section 619 (a) provided that, in computing the sales price, there should be included "any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment," but that "the amount of tax imposed by this title, whether or not stated as a separate charge," and a "transportation, delivery, insurance, installation, or other charge (not required * * * to be included)" should be excluded.

The petitioner, a manufacturer and seller of taxable toilet goods, contends that under this provision there must be excluded from its selling prices the amounts of its advertising and selling

expenses attributable to the taxable articles. We submit that this provision was intended only to provide definite rules for ascertaining the manufacturer's actual f. o. b. price for the taxable articles, and that it permits exclusion only of "charges" for transportation, delivery, insurance, installation or other items similar in nature, insofar as they are not incident to placing the article in condition packed ready for shipment. The expenses here in question are of a wholly different character, and indeed are not "charges" at all unless that term is to be read as embracing every item of expense that contributes to the commercial value of the taxable article. That the expenses in question are not excludable is shown by the language of Section 619 (a), its legislative history, its consistent administrative construction, and its relation to other provisions of the statute.

ARGUMENT

THE PETITIONER'S ADVERTISING AND SELLING EXPENSES WERE NOT EXCLUDABLE FROM ITS SELLING PRICES IN COMPUTING THE TAX IMPOSED BY SECTION 603 OF THE REVENUE ACT OF 1932 AND SECTION 3401 OF THE INTERNAL REVENUE CODE

Section 603 of the Revenue Act of 1932[1] (Appendix A, *infra*) imposed on toilet preparations

[1] The tax imposed by Section 603 on toothpaste and similar articles was terminated as of June 30, 1938, by Section 701 of the Revenue Act of 1938, c. 289, 52 Stat. 447. The remaining provisions of Section 603 were subsequently embodied in Section 3401 of the Internal Revenue Code (26

sold by the manufacturer or producer an excise tax equivalent to stated percentages "of the price for which so sold." The petitioner contends that this provision is qualified by Section 619 (a)[2] (Appendix A, *infra*), in that there must be excluded from the prices for which the petitioner sold taxable articles, the amounts of its selling and advertising expenses allocable to those articles. This contention was sustained by the Circuit Court of Appeals for the Seventh Circuit in the two cases of *Campana Corp.* v. *Harrison,* 114 F. 2d 400, 135 F. 2d 334. It has been rejected, however, by the Circuit Court of Appeals for the Second Circuit in *Bourjois, Inc.* v. *McGowan,* 85 F. 2d 510, certiorari denied, 300 U. S. 682, and by the Court of Claims in *Ayer Co.* v. *United States,* 38 F. Supp. 284. See also *Inecto, Inc.* v. *Higgins,* 21 F. Supp. 418 (S. D. N. Y.); *Luzier's Inc.* v. *Nee,* 24 F. Supp. 608, 611 (W. D. Mo.), affirmed on another ground, 106 F. 2d 130 (C. C. A. 8th), certiorari denied, 309 U. S. 660. We believe that these latter decisions are correct, and that the petitioner has wholly failed to sustain its burden of establishing the existence of a statutory right to the claimed exclusion. Cf. *Interstate Transit Lines* v. *Commissioner,* 319 U. S. 590, 593; *Helvering* v.

U. S. C., Sec. 3401). Section 3401 of the Internal Revenue Code was prospectively amended by Section 3 of the Revenue Act of 1939. (Appendix A, *infra.*)

[2] This became Section 3441 (a) of the Internal Revenue Code.

Amer. Dental Co., 318 U. S. 322, 329–330; *Helvering* v. *Northwest Steel Mills*, 311 U. S. 46, 49; *New Colonial Co.* v. *Helvering*, 292 U. S. 435, 440.

Section 619 (a) of the Revenue Act of 1932, upon which the petitioner places sole reliance, provides for the ascertainment of the "sales price" as follows:

> In determining, for the purposes of this title, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this title, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

The gist of this provision is that the measure of the tax shall be the manufacturer's f. o. b. price at the place of shipment. All of the specified "charges" relate to the ascertainment of the amount of that price, and are of such character that they are often billed as separate charges.

Section 619 (a) clearly reflects the experience gained in the administration of provisions, like the general provision of Section 603 of the Revenue Act of 1932, which had been contained in

earlier Revenue Acts.[3] It had been uniformly ruled, apparently without notable dispute, that no selling expenses of the manufacturer were excludable from its selling price in computing the tax imposed by these earlier statutes.[4] There had arisen, however, troublesome questions whether amounts received by the manufacturer on sales of taxable articles should be adjusted with respect to amounts separately charged by the manufacturer or included in its selling price for containers, for necessary packing for shipment, for the excise tax itself, or for the the cost of shipment from the manufacturer to the customer. In general, the Commissioner allowed exclusion of these items of expense only if the charges had been separately stated in good faith by the manufacturer.[5] In *Lask's Products Co.* v. *United States*,

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[3] Section 600 (a) (b) (e) (f) (g) (h) (i) (j) of the Revenue Act of 1917, c. 63, 40 Stat. 300; Section 900 of the Revenue Act of 1918, c. 18, 40 Stat. 1057; Sections 900, 904 of the Revenue Act of 1921, c. 136, 42 Stat. 227; Section 600 of the Revenue Act of 1924, c. 234, 43 Stat. 253; Section 600 of the Revenue Act of 1926, c. 27, 44 Stat. 9.

[4] Article III of Treasury Regulations 44 (1918 ed.); Article 4 of Treasury Regulations 47 (1919, 1921, 1924, 1926 editions). The same construction was placed upon the 1932 Act in an administrative ruling made shortly after its enactment. S. T. 678, XII-I Cum. Bull. 415 (1933), Appendix A, *infra*, p. 26.

[5] Article III of Treasury Regulations 44, fn. 4; Article 3 of Treasury Regulations 47; L. O. 1096, I-I Cum. Bull. 437 (1922); S. T. 415, II-I Cum. Bull. 285 (1923); cf. *Anheuser Busch Assn.* v. *United States*, 207 U. S. 556, 563; *United States* v. *Wood*, 85 Fed. 212 (C. C. E. D. Va.); *Karthaus* v. *Frick*, Fed. Case No. 7,615 (C. C. D. Md.).

278 U. S. 175, this Court indicated that, at least as an original matter, even the amount of tax separately stated should be included in the selling price in computing the tax, since "the amount added because of the tax is paid to get the goods and for nothing else." (278 U. S. at 176.) Cf. *Shearer* v. *Commissioner*, 48 F. 2d 552, 554–555 (C. C. A. 2d); *Hall-Scott Motor Car Co.* v. *United States*, 3 F. Supp. 818 (C. Cls.).

Section 619 (a) was worded and intended to deal only with the borderline questions of items of expense incurred by the manufacturer in the course of completing sales of taxable articles after the article itself had been manufactured. These matters apart, the tax was imposed on the actual selling price of the manufacturer. Article 8 of Treasury Regulations 46, promulgated under the Revenue Act of 1932 (Appendix A, *infra*). The petitioner's assertion (Br. 18) that Congress meant to draw a line between "manufacturing and non-manufacturing costs" and to exclude from the manufacturer's selling price all but the former is in direct conflict not only with the plain words of the statute but also with the construction made in Lash's case, *supra*. If Congress had intended the creation of the broad and vague categories suggested by the petitioner, it would hardly have expressed that purpose by the detailed specifications of excludable and not-excludable charges found in the statute.

Advertising and selling expenses of the manufacturer are not "other charges" as that term is employed in Section 619 (a). That term embraces only expenses similar in character to those of transportation, delivery, insurance and installation. This view is required by the familiar rule of *ejusdem generis,* by the consistent administrative construction of the Act (G. C. M. 21114, 1939–1 Cum. Bull. 351, 353), and by the statements with reference to its meaning found in the committee reports on the bill which became the Revenue Act of 1932.[6] The parenthetical matter following this phrase and the designation of other

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[6] H. Rep. No. 708, 72d Cong. 1st Sess., p. 37 (1939–1 Cum. Bull. (Part 2) 457, 483) stated—

"Section 604 provides rules for determining the sale price which is the basis of the tax. In general, this should be the manufacturer's or producer's price at the factory or place of production. This means that charges for coverings and containers and charges incident to preparing the article for shipment or delivery should be included, while transportation, delivery, insurance, and *like charges* should be excluded." [Italics supplied.]

As reported by the Senate Finance Committee, the provisions of Section 604 of the Bill as passed by the House were included as Section 606 (a) of the Bill, and amended to specify that it was immaterial whether the charges were separately stated. S. Rep. No. 665, Part 3, 72d Cong., 1st Sess., p. 3, contains the following explanation by Senator Walsh (a member of the Senate Finance Committee) of the provision which eventually was adopted by the Senate:

"SEC. 604. SALE PRICE

"This gives rules for determining sales price in specific cases.

"(a) The general rule. It provides for the inclusion of

excludable charges in no way militates against this view, since it serves simply to provide that, to the extent that the provisions for inclusion and exclusion may overlap, the former shall control. Thus, a transportation charge incident to putting the taxable article in condition for shipment would be included in the selling price. Article 12 of Treasury Regulations 46, promulgated under the Revenue Act of 1932 (Appendix A, *infra*); G. C. M. 21114, *supra*. The sole function of the provision for exclusion of "other charges" was, therefore, to exclude from the selling price such miscellaneous expenses as those of warehousing, telegrams, etc., incurred in the process of getting the taxable articles to the customer.

Obviously, however, expenses of the character sought to be excluded in the present case are in no way comparable to charges for delivery, in-

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all charges incident to placing the article in condition for shipment and for the exclusion of transportation, delivery, and *similar charges*." [Italics supplied.]

The provision was enacted as Section 619 (a) of the Act in the form recommended by the Senate Finance Committee. The Conference Committe Report (H. Conference Rep. No. 1492, 72d Cong., 1st Sess., p. 22 (1939-1 Cum. Bull. (Part 2), 539, 548) states—

"Amendment No. 183: This amendment eliminates the provisions of the House bill relating to determination of the tax in the cases of sales at retail and sales at less than fair market price and provides (1) a method of determining sale price by including charges for containers and the like and excluding the tax under Title IV and transportation, delivery, and *similar charges* • • • The House recedes." [Italics supplied.]

surance, or installation. Indeed, they do not constitute "charges" of any nature unless that term is to be construed to include every item of expense that contributes to the commercial value of the taxable article. The petitioner concedes (Br. 23, 25–26) that the very purpose and effect of expenses of the kind here involved is to build up a consumer demand which adds to the commercial value of the taxable articles. These expenses were as much a part of the production of the distinctive Fitch products involved (R. 26) as the costs of materials and labor which went into their production. Since the tax in question is not a tax on profits but an excise tax measured by the selling price of the articles, it is wholly immaterial that, as the petitioner points out (Br. 23–24), the manufacturer may not in all cases increase its profits by incurring these expenses.

Elsewhere in the Act Congress specified and made particular provision for cases where it deemed the manufacturer's business methods to be of such character as to require special treatment in order to prevent discriminatory application of the tax.[7] It provided in Section 619 (b) (Appendix A, *infra*) that where the manufacturer sold at retail, or otherwise than through a transaction at arm's length, the tax should be based on a figure determined by the Commissioner with

[7] See statement in H. Rep. No. 708, *supra*, pp. 32–33, set forth in Appendix B, *infra*.

reference to the prices at which similar articles were sold in the ordinary course of trade.[8] The special treatment made in such cases, particularly in the case of sales by the manufacturer at retail, gives sharp emphasis to the failure of Congress to make similar provisions for cases like the present, where none of the manufacturer's sales was at retail. The portions of the legislative history principally relied upon by the petitioner, and by the Circuit Court of Appeals for the Seventh Circuit in the *Campana* cases, *supra,* relate only to the special situation of sales by a manufacturer at retail,[9] and in no way detract from the frequent statements in the Congressional proceedings that the normal measure of the tax was to be the manufacturer's or wholesaler's selling price.[10]

The petitioner's argument on Section 619 (b) assumes that employment of a nominally distinct but controlled selling corporation would enable the manufacturer to obtain exclusion of the advertising and selling expenses attributable to the tax-

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[8] Like provision was made in Section 619 (b) with respect to sales on consignment, and in Section 622 with respect to articles used by the manufacturer or producer.

[9] The statements in question are one by Congressman Crisp, 75 Cong. Record, Part 5, pp. 5693–5694, and another in H. Rep. No. 708, *supra*, pp. 32–33, which require no more than to be set forth in full, as has been done in Appendix B, *infra*, to show their true meaning.

[10] See, e. g., H. Rep. No. 708, *supra*, p. 37, quoted *supra*, fn. 6; Statement of Senator Blaine, 75 Cong. Record, Part 10, p. 11383; Statement of Senator Walsh, 75 Cong. Record, Part 10, p. 11657.

able articles. It is urged, further, that in order to prevent discriminatory application of the tax, manufacturers who sell directly to the trade should also be allowed to exclude these expenses. The cases are in agreement, however, that Section 619 (b) prevents avoidance of the tax through use of a controlled selling corporation. *Campana Corp.* v. *Harrison, supra; Bourjois, Inc.* v. *McGowan, supra; Ayer Co.* v. *United States, supra; Inecto, Inc.* v. *Higgins, supra; Luzier's, Inc.* v. *Nee, supra.* In the *Campana* cases, *supra* the Circuit Court of Appeals sustained imposition of the tax on the prices actually received by the selling corporation, but held that advertising and selling expenses should be excluded. The decisions rested, not upon the nominally distinct character of the selling corporation, but upon the broad ground that advertising and selling expenses must be excluded from the manufacturer's selling price regardless of the employment of a separate selling corporation. That is the very question in issue in this case.

Exclusion of advertising and selling expenses incurred in the usual course of business as a manufacturer would introduce serious administrative difficulties. Section 619 provides generally for the calculation of the excise taxes imposed by Title IV of the Revenue Act of 1932. These include, in addition to the tax imposed on toilet articles by Section 603, taxes on furs, jewelry, automobiles, radios, mechanical refrigerators, sporting goods,

firearms, cameras, etc. (Sections 604 *et seq.*). If the petitioner's contention is correct, Section 619 (a) also permits exclusion of the advertising and selling expenses of manufacturers of all these taxable articles. Section 626 (Appendix A, *infra*) requires monthly returns and payment of the tax. Section 619 (c) (Appendix A, *infra*) requires that the tax be paid upon each payment received by the manufacturer under a lease, conditional sale, etc., of a taxable article. The difficulties of allocating advertising expenses under such provisions become clear upon consideration of the role of advertising in modern business. Much advertising is of an institutional nature, and the selling price of an advertised product normally reflects advertising and selling expenses incurred over a period of years. Particular manufacturers may make articles subject to different rates of tax, and also articles which are not subject to tax. Congress regarded ease and simplicity of administration as a prime requisite of the excise taxes enacted by the Revenue Act of 1932, and considered that the provisions of Section 619 met that requirement.[11] That Congressional purpose would be frustrated if the statute is to be construed as the petitioner contends.

Exclusion of the expenses here involved would be inconsistent with the basic principle of the selective excise tax adopted by Congress in the

[11] H. Rep. No. 708, *supra*, pp. 31, 33 (1939-1 Cum. Bull. (Part 2) 457, 479, 481).

Revenue Act of 1932. Congress, hard pressed as a result of the depression to find new sources of revenue to compensate for the drying up of the usual sources of revenue,[12] first considered a general manufacturer's excise tax, but finally turned to an excise tax on selected commodities in the belief that this would be the fairest feasible way of obtaining the needed revenue.[13] To allow ex-

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[12] H. Rep. No. 708, *supra*, pp. 1 *et seq.* (1939–1 Cum. Bull. (Part 2) 457 *et seq.*); S. Rep. No. 665, *supra*, pp. 1 *et seq.* (1939–1 Cum. Bull. (Part 2) 496 *et seq.*)

[13] After eight weeks of deliberation the Committee on Ways and Means reported a bill (H. R. 10236, 72d Cong., 1st Sess.) which imposed a general excise tax of two and one-fourth per cent upon the "sale price" of articles sold in the United States by manufacturers or producers thereof, with exemptions in favor of certain articles and manufacturers. (Secs. 601, 602, 606.) There was strong opposition to the breadth of the tax base (H. Rep. No. 708, *supra*, p. 9 (1939–1 Cum. Bull. (Part 2) 457, 463); Statement of Congressman Lovette, 75 Cong. Record, Part 5, p. 5795; Statement of Congressman Schafer, 75 Cong. Record, Part 6, p. 6377), but the general manufacturer's tax was justified by the Committee on the grounds that a tax on "luxuries" would not produce the needed revenues, however high might be the rate, and that a tax on selected industries would be discriminatory (H. Rep. No. 708, *supra*, p. 9). The general manufacturer's tax was eventually stricken from the Bill in the House by the adoption of a committee amendment (75 Cong. Record, Part 6, p. 6819), and there were adopted instead excise taxes on various particular articles, including toilet preparations (75 Cong. Record, Part 6, pp. 7034 *et seq.*). This action left the Bill without any provisions corresponding to those of Section 604 of the Bill (to which the statements referred to in footnote 9, *supra* and set forth at Appendix B, *infra*, pertained). Thereafter Congressman Crisp offered, and the House adopted, a committee amendment providing that where a manufacturer customarily sold

clusion of these expenses would mean that the greater the promotional expenses incident to the manufacture or production of a taxable article, the less would be the effective rate of tax thereon. It would work a plain discrimination between advertised and unadvertised products, for it would exclude from the tax base for the former articles, amounts attributable to expenses made for the very purpose and with the usual effect of increasing their commercial value. It is true that to refuse the manufacturer exclusion of the advertising and selling expenses in cases like the present will not completely eliminate discrimination of this kind. A seller or distributor of taxable articles who is not also a manufacturer or producer, but who purchases the articles from an independent manufacturer or producer, may add to the commercial value of the taxable articles by advertising them, and this increment in value will go untaxed. That this possibility of avoidance involves serious elements of discrimination may be doubted however, in view of the fact that it

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taxable articles both at wholesale and retail, the tax on articles sold at retail "shall be computed on the price for which like articles are sold by him at wholesale," and that in cases of sales not at arm's length the tax should be computed on the "fair market price of such article." (75 Cong. Record, Part 7, pp. 7242–7243.) As passed by the House the Bill contained no definition of this term.

The provisions of Section 619 of the statute as finally enacted were adopted as the result of recommendations by the Senate Committee on Finance. See H. Conference Rep. No. 1492, *supra*, Amendment No. 183, p. 22 (1939–1 Cum. Bull. (Part 2) 539, 548).

entails business disadvantages which have prevented many firms from abandoning their functions as manufacturers or producers.[14] Whatever element of discrimination there may be is, in any event, the inevitable result of an excise tax based on the selling price of the manufacturer or producer.

While the amendment to Section 3401 of the Internal Revenue Code (the successor of Section 603 of the Revenue Act of 1932) by Section 3 of the Revenue Act of 1939 has no direct application to this case,[15] some comment on that provision is

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[14] See statement submitted by counsel for the Toilet Goods Association, Hearings before the Committee on Ways and Means on Revenue Revision, 1939, 76th Cong., 1st Sess., pp. 204, 205—

"A manufacturer advertising and selling his own produce at 50 cents pays a 5-cent tax on an article. A concern which purchases the same article at a base cost of 20 cents and then brands, advertises, and sells the article, absorbs a tax of only 2 cents on the same article. The disparity is obvious.

"If the question be asked, why can't the first manufacturer change his method so as to purchase the manufactured article from others, the answer is obvious. In the first place, only by the first method of doing business can the manufacturer control the quality of his product. Secondly, the purchase of the product from others would require the manufacturer (under the new Food, Drug, and Cosmetic Act) to add additional labels to his package, one of which would have to state "Distributed by" or "manufactured by." The effect of such change in labeling upon an established consumer trade, if not certainly damaging, is at least too doubtful to warrant any established firm in risking a change of its established method of doing business."

[15] Section 3 (b) of the Revenue Act of 1939 limited the applicability of Section 3 (a) to sales of taxable products on and after June 30, 1939. While it appears (R. 24–27) that

required in view of the credence apparently given by the Circuit Court of Appeals for the Seventh Circuit in the *Campana* cases, *supra* (114 F. 2d 410; 135 F. 2d 336), to a contention that this amendment was a declaration by Congress that it had intended by the 1932 Act to permit these expenses to be excluded from the selling price.

Section 3 (b) of the 1939 amendment expressly declared that the amendments made by Section 3 (a) thereof should be effective only as to the period after the date of its enactment. The amendment cannot, therefore, be considered to have been declaratory of the meaning of even Section 3401 of the Internal Revenue Code. Moreover, Section 3 (a) itself expressly provided that the amendment relied upon by the taxpayer was made "nothwithstanding" the provisions of Section 3441 (a) (successor of Section 619 (a) of the Revenue Act of 1932). Unlike Section 3401, which applied only to toilet preparations, this latter section applied to numerous other excise taxes imposed by the Revenue Act of 1932.

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this case involves articles sold during the period from October 1, 1936, to and including June 30, 1939, it does not appear that any articles were sold on the last day of the period. In the absence of proof of this fact, the petitioner could not recover any amount under the 1939 amendment even if it did allow exclusion of expenses of the character here in question. *Niles Bement Pond Co.* v. *United States*, 281 U. S. 357, 361; *Burnet* v. *Houston*, 283 U. S. 223; cf. *Helvering* v. *Taylor*, 293 U. S. 507, 514. In any event, the question is not presented here, since it was not raised in the petition for certiorari. *Southport Co.* v. *Labor Board*, 315 U. S. 100.

The argument reduces itself to this: that an expressly prospective amendment of Section 3401 of the Internal Revenue Code, made "notwithstanding" Section 3441 (a), was a legislative declaration that the meaning of the latter section had always been the same as that of the former section in its amended form. The contention refutes itself. On the contrary, the 1939 amendment recognized that expenses of the character embraced therein could not be excluded under Section 3441 (a). Moreover, the amendment has been construed not to extend to expenses such as are involved here. As the Court of Claims held in *Ayer Co.* v. *United States, supra,* p. 289:

> it was not all advertising and selling expenses that were to be excluded under the Revenue Act of 1939; it was only the *wholesaler's* expenses of advertising and selling. Manufacturer's advertising and selling expenses are not mentioned. By implication they are to be included. This, we think, is a continuation of the policy behind the 1932 act. [Italics added.]

The 1939 amendment failed to achieve satisfactory results, and in Section 552 (b) of the Revenue Act of 1941, c. 412, 55 Stat. 687, Congress substituted a retail excise tax for the manufacturer's excise tax on toilet preparations. The reasons assigned for the change were that under the earlier law "evasion is substantial and inequitable competitive situations are created." H. Rep. No. 1040, 77th Cong., 1st Sess., p. 33.

CONCLUSION

The decision of the court below is correct and should be affirmed.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
ANDREW D. SHARPE,
Special Assistants to the Attorney General.

DECEMBER 1944.

APPENDIX A

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 603. TAX ON TOILET PREPARATIONS, ETC.

There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, tooth and mouth washes (except that the rate shall be 5 per centum), dentifrices (except that the rate shall be 5 per centum), tooth pastes (except that the rate shall be 5 per centum), aromatic cachous, toilet soaps (except that the rate shall be 5 per centum), toilet powders, and any similar substance, article, or preparation, by whatsoever name known or distinguished; any of the above which are used or applied or intended to be used or applied for toilet purposes.

SEC. 619. SALE PRICE.

(a) In determining, for the purposes of this title, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this title, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by

the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

(b) If an article is—

(1) sold at retail;

(2) sold on consignment; or

(3) sold (otherwise than through an arm's-length transaction) at less than the fair market price; the tax under this title shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Commissioner.

(c) In the case of (1) a lease, (2) a contract for the sale of an article wherein it is provided that the price shall be paid by installments and title to the article sold does not pass until a future date notwithstanding partial payment by installments, or (3) a conditional sale, there shall be paid upon each payment with respect to the article that portion of the total tax which is proportionate to the portion of the total amount to be paid represented by such payment.

SEC. 626. RETURN AND PAYMENT OF MANUFACTURERS' TAXES.

(a) Every person liable for any tax imposed by this title other than taxes on importation (except tax under section 615, relating to tax on soft drinks) shall make monthly returns under oath in duplicate and pay the taxes imposed by this title to the collector for the district in which is located his principal place of business or, if he has no principal place of business in the United States, then to the collector at

Baltimore, Maryland. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe.

(b) The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until paid.

Internal Revenue Code:

SEC. 3401. TAX ON TOILET PREPARATIONS, ETC.

There shall be imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, aromatic cachous, toilet powders, and any similar substance, article, or preparation, by whatsoever name known or distinguished; any of the above which are used or applied or intended to be used or applied for toilet purposes. (26 U. S. C. Sec. 3401.)

Section 3441 of the Internal Revenue Code (26 U. S. C., Sec. 3441) is substantially the same as Section 619 of the Revenue Act of 1932.

Revenue Act of 1939, c. 247, 53 Stat. 862:

SEC. 3. TOILET PREPARATIONS TAX AMENDMENTS.

(a) Section 3401 of the Internal Revenue Code (relating to the tax on toilet

preparations) is amended by inserting at the end thereof the following new paragraphs:

* * * * *

"Notwithstanding section 3441 (a), in determining, for the purpose of this section, the price for which an article is sold, whether at arm's length or not, there shall be included any charge for coverings and containers of whatever nature, only if furnished by the actual manufacturer of the article, and any charge incident to placing the article in condition packed ready for shipment, only if performed by the actual manufacturer of the article, but there shall be excluded the amount of the tax imposed by this section, whether or not stated as a separate charge. Whether sold at arm's length or not, a transportation, delivery, insurance, or other charge, and the wholesaler's salesmen's commissions and costs and expenses of advertising and selling (not required by the foregoing sentence to be included), shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations."

(b) The amendments made by subsection (a) shall be effective only with respect to sales made after the date of the enactment of this Act. (26 U. S. C., Sec. 3401.)

Treasury Regulations 46 (1932 ed.):

ART. 8. *Basis of tax on sales generally.*—The tax is imposed on each sale by the manufacturer of the articles enumerated in these regulations. The provisions of the Act quoted embody the rules for determin-

ing the sale price, which is the basis of the tax. In general, this should be the manufacturer's actual price at the factory or place of production. In determining the sale price, for tax purposes, there shall be included any charge incident to placing the article in condition packed ready for shipment. There shall be excluded (1) the amount of tax imposed by Title IV, whether or not billed as a separate item, and (2) (subject to the provisions of article 12) transportation, delivery, insurance, installation, or other charges (not required by the preceding sentence to be included).

* * * * *

ART. 12. *Exclusion of charges for transportation, delivery, etc.*—Charges for transportation, delivery, insurance, installation, and other charges which have no connection whatever with the manufacturing process or with placing the article in a finished condition packed and ready for shipment, are to be excluded in computing the tax. Any additional charge which a purchaser would not be required to pay if he accepted delivery of the article at the factory may be so excluded.

These additional charges may not be excluded in computing the tax unless the amount thereof and the fact that they represent fair charges are established by adequate records to the satisfaction of the Commissioner.

Cumulative Bulletins XII–I, p. 415:

SECTION 619.—SALE PRICE.

* * * * *

REGULATIONS 46, ARTICLE 13: Discounts and adjustments. XII-23-6216 S. T. 678

EXPENSES AND COMMISSIONS.

Advice is requested whether a demonstrator's expenses and commissions may be deducted from the net sale price of merchandise in computing the tax due.

It is stated that when the manufacturer closes a sale with a department store and it requests a demonstrator it is necessary for the manufacturer to furnish one free of charge and pay expenses and a commission of 10 or 15 percent on all retail sales made during the demonstrator's stay at the store. The question is asked whether such expenses and commissions are deductible for tax purposes.

The tax imposed by section 619 of the Revenue Act of 1932 is upon the sale price of the manufacturer, producer, or importer. Salaries, commissions, etc., paid to employees are not deductible in computing the tax, since they constitute a part of the selling expense.

Consequently, where a manufacturer sells merchandise to a department store and furnishes the store with a demonstrator, paying all expenses, plus commissions, the expenses and commissions may not be deducted from the sale price of the merchandise.

APPENDIX B

H. Rep. No. 708, 72d Cong., 1st Sess., pp. 32–33, 1939–1 Cum. Bull. (Part 2) 457):

UNIFORM APPLICATION OF TAX

It is of utmost importance that the tax be imposed and administered uniformly and without discrimination. Each member of a competitive group must pay upon substantially the same basis as all his competitors, even though his sales methods may differ. Consequently, the bill requires that every effort be made to ascertain the manufacturers' or producers' price at the place of manufacture or production. In the case of those commodities which are ordinarily sold at wholesale, this price will be the price at which the manufacturer sells to the wholesaler, even though the particular sale is at retail. This price may be established with respect to any particular sale or class of sales, for example, by existing wholesale prices, or by a system of discounts from retail prices, or by a building up from cost of production, whichever method may be the most practical. On the other hand, many commodities are not sold at "wholesale"—such as articles sold on specification or on special order. In cases of this kind, the tax is imposed upon the price at which the article actually is sold by the manufacturer.

It is expected that the officials in charge of the administration of the tax will confer

with representatives of each particular industry and with groups of taxpayers confronted with similar problems, and reach an agreement with them as to the methods by which the amount of their tax liability is computed. A principle agreed on in this manner should be applied uniformly to each member of the industry or group, whether or not he participated in the conference. Severe and justified criticism may be expected whenever one manufacturer is permitted to pay a lesser tax than his competitor.

Here, again, the matter of exemptions presents itself. Whenever an exemption is granted with respect to any particular article, the competing article must also be granted an exemption. Thus, the list of exemptions expands. And notwithstanding, unfairness and discrimination will appear, by reason of changes in competitive conditions, or by reason of our failure to consider or appreciate fully existing competitive conditions.

75 Cong. Record, Part 5, pp. 5693–5694—

Mr. HARLAN. Does the manufacturer's price that is contemplated include salesmen's commissions? I ask that question for the reason that there is an association of manufacturers in this country who deal directly with the purchaser and not through brokers or wholesale agents. They feel that their commissions are larger than if the commodities are sold directly through the wholesalers. They are fearful that this tax will discriminate against them because if it is decided on the wholesale price they will be paying a higher tax than the manufacturer who deals through the wholesaler.

Mr. CRISP. The selling cost is not intended to be added. Now, we are considering things like that, and there will be other cases that will present themselves. Some committee amendments may be necessary.

There is a provision in the bill giving the Treasury Department authority to enter into agreements with people of that kind and others as to what is a fair manufacturer's wholesale price. That agreement can not be changed, but it shall run during all of the period so that the man manufacturing will know what his tax is. The tax is to be levied on the wholesale manufacturer's price, and if he is selling to these agents he and the Treasury Department will agree as to what is a fair manufacturer's price.

U. S. GOVERNMENT PRINTING OFFICE: 1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 181

THE F. W. FITCH COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF JOSEPH H. CHOATE, JR. AND MAURICE LÉON AS *AMICI CURIAE*

JOSEPH H. CHOATE, JR.,
MAURICE LÉON,
Amici Curiae.

December, 1944.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF JOSEPH H. CHOATE, JR. AND MAURICE LÉON AS *AMICI CURIAE*

The undersigned, Joseph H. Choate, Jr., and Maurice Léon, respectfully ask leave of the Court to file herein the following brief as *amici curiae*.

They appear as counsel for the plaintiff in the case of Caron Corporation against Joseph T. Higgins, Collector, now pending in the United States District Court for the Southern District of New York which involves questions of law similar to those presented in this case.

Counsel for the petitioner and for the respondent herein have consented to the filing of this brief.

Summary of Argument

1

The Act literally interpreted, requires deduction of advertising and selling expense from the price on which the tax is based. In explicit terms it permits deduction of any "transportation, delivery, insurance, installation *or other charge.*" Advertising and selling charges are among such "other charges" unless the Act does not mean what it says.

2

Other provisions of the Act and its legislative history show that its literal meaning is its true meaning.

3

The only argument for a restricted meaning, such as would except advertising and selling charges from the permission to exclude "other charges," is that the *ejusdem generis* rule limits such "other charges" to charges resembling these enumerated. That rule is inapplicable because transportation, delivery, insurance and installation do not constitute a "genus" to which "other charges" can be limited, and because the rule is never allowed to reverse literal meaning when the indications from other provisions and legislative history point to the literal as the true meaning.

4

The Treasury regulations in force from the adoption of the 1932 Act until its amendment in 1939, permit deduction of "non-manufacturing charges," which must include advertising and selling charges. The 1939 Amendment was an adoption of, and not a change in, this administrative construction.

5

This is not an instance of a claim for a deduction from an established tax, requiring strict construction. The language in question is part of the original definition of the price on which the tax is levied. The ordinary rule requiring liberal construction in favor of the taxpayer is therefore applicable.

ARGUMENT

I

The price on which the Manufacturers' Excise Tax levied by the 1932 Revenue Act is based should exclude the manufacturers' selling and advertising expense. The decision under review erred in its refusal to follow the decisions of the Circuit Court of Appeals for the Seventh Circuit to this effect, and in its holding to the contrary.

A

The literal meaning of the Act is to that effect.

Section 619(a) defining the price on which the tax is to be based, provides that this price shall include certain manufacturing costs for container, &c., but that various non-manufacturing costs shall be excluded. The phrase covering the later is

> "A transportation delivery insurance installation *or other charge* (not required by the foregoing sentence to be included) shall be excluded * * *." (Italics ours.)

The "foregoing sentence" referred to is that which requires inclusion of charges for containers, &c.

Since advertising and selling costs are charges which any manufacturer who incurs them must include in his price if he is to live, they are clearly "charges" within the meaning of the section. They are not transportation delivery insurance or installation charges, but are "other

charges" since the phrase "other charges" is universal, comprising all charges other than those specifically excepted. As such other charges, therefore, advertising and selling are to be excluded if the Act means what it says. That this literal meaning is the true meaning, not to be limited or reversed by the "*ejusdem generis*" rule or otherwise, appears from the following considerations.

B

The language of the statute, considered as a whole, and its legislative history, show that Congress did not intend to tax the manufacturer on his selling and advertising costs.

The arguments for this proposition, are convincingly set forth in the decisions of the Seventh Circuit in *Campana Corp.* v. *Harrison*, 114 Fed. (2nd) 400 and 135 Fed. (2nd) 334. They are effectively presented and amplified in the petitioner's brief herein. The opinion under review does not attempt to answer them. We desire to state only the following single additional argument.

The section of the statute which determines how the price, on which the tax is to be based, shall be computed is § 619. This consists of two sub-sections: § 619(a) which prescribes generally what shall and what shall not be deducted, for the purpose of tax computation, from the price actually charged; and § 619(b) which prescribes how, in cases in which the price actually charged is abnormal, a normal price shall be estimated.

Since there is nowhere the slightest indication that the deductions under these two sections are to be different, the conclusion is inescapable that they are to be the same.

Section 619(b), however, as regards one of the classes of sales which it covers, definitely requires that the manu-

facturer's selling and advertising costs be excluded. As to each of three specified classes of sales, it prescribes, by a single phrase, making no distinction between them either as to deductions or anything else, how the tax should be computed. It is to be based, in all three classes, not on the price actually received, but on

> "the price for which such articles are sold in the ordinary course of trade by manufacturers &c."

That this price, in the case of all three classes of sales is a wholesale price is obvious, since manufacturers, in the ordinary course of trade, do not sell otherwise.

One of the three specified classes of sales, however, is "sales at retail." The requirement that these be taxed, as even the Treasury (Reg. 46, Art. 15) has always explicitly recognized that they must be, on wholesale and not on retail prices, in effect requires that the selling cost be deducted from the price actually received. Sales at retail, of course, cannot be made without retail selling expenses, which ordinary wholesale prices naturally exclude. The theoretical ordinary wholesale price cannot be computed without deducting them from the prices actually received. So here we have a class of sales on which such costs definitely are to be deducted.

It is inherently improbable that Congress meant to permit such a deduction in the case of manufacturers who sell in one way, and deny it to those who sell by a different method. No such intent can be imputed to any statute. If Congress had meant that deduction of selling costs should be allowed in sales at retail, but not in sales on consignments or sales not at arm's length, it would have said so.

C

The contrary construction adopted by the Court below involves discrimination between manufacturers which Congress cannot have intended.

It is common knowledge that many manufacturers incur enormous advertising and selling costs, and that others, selling to wholesalers or perhaps to a single distributor, incur practically none, the buyers doing the advertising. The advertising manufacturer's price, on which the tax is based, must cover his advertising as well as his manufacturing costs, or he will cease to do business. But if his tax is to be based on the whole price without deduction, and is thus to include, besides the tax on manufacture, a tax on advertising, &c., he can never compete with his non-advertising competitor, who for the same sales pays only a much smaller tax.

In *Ayer Co.* v. *U. S.*, 38 Fed. Supp. 284, followed in the opinion below, the Court of Claims expressed the odd opinion that this difference was unimportant because the manufacturer doubtless made a profit proportionate to his expense. This was pure conjecture; but, if correct, would have no tendency to show that Congress meant its tax on some manufacturers enormously to exceed that on others for similar sales, or to penalize overwhelmingly the advertising manufacturer's mode of conducting his business. The profit which the advertising manufacturer makes, however large it is, is subject to the tax, even if the tax be based, as we maintain that it should be, on the price after deduction of selling costs.

It is incredible that Congress intended, as the opinion below holds, to tax one manufacturer on a totally different basis of computation from another.

A simple illustration will show the enormous extent and arbitrary nature of the discrimination which would result from the decision under review. Manufacturers A and B each sell goods of which the manufacturing cost is $500,000. Manufacturer A sells his at arm's length without advertising or selling expenses, to a single distributor, for $800,000. He is taxed on this sum. Manufacturer B spends $1,000,000 in advertising and receives a total price of $1,800,000, making the same profit as Manufacturer A. Under the Act, as construed below, Manufacturer A would be taxed on $1,800,000. The discrepancy might well be worse. If Manufacturer B in the supposed case were introducing a new product, he might receive no profit over his combined manufacturing and selling costs; yet, under the opinion below, he would pay as a manufacturer's excise tax, a huge sum inflated by the entire cost of his advertising. Such a tax would not be a Manufacturer's Excise Tax at all, but a tax on advertising pure and simple; and there is nowhere a suggestion of evidence that Congress meant to levy such a tax.

D

The literal meaning of the Act should not be limited or reversed by the *"ejusdem generis"* rule. The learned Court below erred in basing its decision, as it did, solely upon that rule and upon an incorrect application thereof.

Disregarding all the considerations which show that Congress did not intend that the price should include selling costs, the opinion below construes the Section, 619(a), simply by applying the *ejusdem generis* rule. It holds, without other reasoning, that the direction to exclude "transportation, delivery insurance, installation or other" charges must under that rule be limited to charges similar to those specified, and that selling costs are not thus similar.

In discussing this conclusion, the first consideration must be that the rule is, as this Court said in *Given* v. *Hilton*, 95 U. S. 591, "a mere presumption easily rebutted by evidence of contrary intention." As the authorities cited in the petitioner's brief show, it can never operate when the text and legislative history of a statute indicate as they do in this instance a contrary intent. Second, the rule exactly reverses the literal meaning of language. Here, for example, when the statute says "transportation delivery insurance, installation or other" charges, the literal meaning of "other" necessarily includes only charges which are *not* transportation delivery insurance or installation charges, but are other or different in nature. The rule is, therefore, properly applied only when the Court can see from other indications of the legislative intent, that the literal is not the true meaning of the language to be construed. To apply it as the sole criterion of interpretation is unjustified; and just such applications have led many to regard the rule as the fount of infinite bad law.

Bearing in mind these reasons for caution in any use of the rule, the *ejusdem generis* rule as applied below, is inapplicable here for the following specific reasons.

(A)

IT NEVER APPLIES WHEN THE SPECIFIC INSTANCES ENUMERATED, BEFORE THE GENERAL WORDS, DIFFER MATERIALLY FROM EACH OTHER.

This is well established.

Lindsay & Phelps v. *Mullen*, 176 U. S. 126, 138;
Regina v. *Payne*, L. R. 1 C. C. 27;
Brown v. *Corbin*, 40 Minn. 508 (cited by this Court in *Lindsay* v. *Mullen*, *supra*);

Donaghy v. *State*, 29 Del. 467;
McReynolds v. *People*, 230 Ill. 623;
Darius v. *Apostolos*, 68 Col. 323.

In the statute under discussion, the particular instances differ from each other quite as widely as those in the cases cited, and too widely to constitute a genus to which the general term "other charge" can be confined. Charges for transportation, delivery and insurance are of course related; each is a charge covering transactions which occur after manufacture and pending receipt by the buyer. But a charge for installation is entirely outside of this category. It covers operations after receipt, and cannot possibly be or in any sense, resemble, a charge for transportation, insurance, or delivery. What "other charge" could resemble it, is hard to see. The only feature which a charge for installation has in common with the others is the fact that it is a non-manufacturing cost, as opposed to the various manufacturing costs, likewise enumerated (for containers, &c.) which the section (619(a)) requires to be included. Either the "genus" is as wide as this, or there is none to which the rule can apply; and if the sole trait common to the enumerated charges is a non-manufacturing character, then the general words "other charge" must, even under the rule, comprise all other non-manufacturing charges, including the selling expenses here in question. Quite probably it was upon this view that the Treasury based the ruling, issued on the enactment of the statute and continued unchanged until 1939 (Art. 12, Reg. 46, cited in *Campana* v. *Harrison*, 114 Fed. (2nd) at p. 410), that

> "charges which have no connection with the manufacturing process * * * are to be excluded in computing the tax."

(B)

THE COURT BELOW APPLIED THE EJUSDEM GENERIS RULE TO A PART ONLY OF THE LANGUAGE WHICH DEFINES THE CHARGES WHICH ARE TO BE EXCLUDED.

The opinion below discusses the meaning only of the words

> "A transportation, delivery, insurance, installation or other charge."

The complete language, however, is

> "A transportation, delivery, insurance installation or other charge (not required by the foregoing sentence to be included)."

The "foregoing sentence" referred to is that which requires inclusion in the basis-price of

> "any charge for coverings or containers of whatever nature and any charge incident to placing the article in condition packed ready for shipment."

In defining the charges which were to be excluded, therefore, the Congress carefully and specifically excepted from the definition these charges for containers, &c. It is elementary that the making of specific exceptions indicates an understanding that, but for the exception, the excepted items would be included. Nothing can be clearer, however, than that no charge for any covering or for any container, or for placing any article in condition *for* shipment could be a transportation charge or a charge for delivery or insurance or installation or a charge *ejusdem generis* with any or all of these. If, however, the words "other charge" mean what they say—any other charge *not* similar to transportation, delivery, insurance, or installation

charges—the excepted charges for containers, &c. would fall within the excluding category, and so would require specific exception. The making of the exceptions, thus, can only be accounted for by an intention on the part of the Congress that the "other" charges which were to be excluded should comprise all other charges incurred by the manufacturer which he would have to include in his price, and not be limited by the *ejusdem generis* rule.

E

The learned Circuit Court of Appeals for the Seventh Circuit in the second *Campana* case (135 Fed. (2nd) 334) was right in holding that the provision of the 1939 amendment, specifically excluding selling costs, was declaratory of the existing law.

The 1939 amendment, enacted as Section 3401 of the Internal Revenue Code, 53 Stat. 862, 863, in defining the excluded charges omits, after the words "transportation, delivery, insurance" the word "installation." It adds after the words "or other charge" and before the exception (not required by the foregoing sentence to be included)

> "and the wholesalers salesmen's commissions and costs and expenses of advertising and selling."

This new language aptly states the effect of the Treasury regulation already quoted (Art. 12, Reg. 46) which permitted the exclusion of

> "charges which have no connection with the manufacturing process."

The Amendment thus constituted a Congressional adoption of an administrative interpretation which had been maintained by the Treasury for more than six years.

It will presumably be argued that since the 1939 Amendment was prospective only, it must have been meant to change, rather than declare, the existing law. This, however, is fallacious, for several reasons. First, in view of the long-standing Treasury regulation re-stated in the Amendment nothing was to be gained by making retroactive the words requiring the exclusion of selling costs. Second, the Amendment contained other features which were new and were naturally not meant to be retroactive—for example, those requiring the inclusion of container charges only when incurred by the manufacturer; the provision that unless the manufacturer owned 75% of the first purchaser, the sale was to be deemed, *prima facie*, at arm's length; and the requirement that the same items be deducted whether the sale was at arm's length or not. These charges were to apply only on future sales, and are ample to account for the prospective character of the amendment without assuming that the exclusion of selling costs was new.

It may also be argued that in *Ayer* v. *U. S.*, 38 Fed. Supp. 284, the Court of Claims held that the 1939 Amendment excluded, not the manufacturers', but only the wholesalers', costs and expenses of advertising and selling.

That this view is untenable should be demonstrated by the briefest analysis. The tax was an excise tax on manufacturers, not on wholesalers. It was to be based on the manufacturers' price. How could any sane Congress require computation of that price by deducting from it someone else's costs and expenses of selling and advertising? The results of such a computation would be ludicrous. Manufacturer Jones might receive from Wholesaler Smith a price of $100,000. Wholesaler Smith might spend in selling and advertising a sum vastly greater than $100,000.

If Smith's selling costs were deductible, Jones would pay no tax at all. No such nonsense can have been intended.

It may be urged that in the *Campana* case the deductions permitted by the Court were in fact of the wholesaler's advertising and selling costs, rather than those of the manufacturer. There, however, the Court was not taxing the wholesaler's price less his costs, but was estimating under § 619(b) the imaginary or theoretical "price for which such articles are sold in the ordinary course of trade by manufacturers." It held the price actually charged by the selling corporation to be some evidence of this theoretical manufacturer's price, but to represent it fairly only after the selling costs were deducted. The selling costs were deducted, not because they were the wholesaler's, but because the manufacturer's price on which the tax was to be levied, should not include such items, no matter by whom incurred.

F

If there be doubt as to the right of the taxpayer to deduct advertising and selling costs, such doubt should be resolved in his favor.

It will probably be argued that we are relying upon an exception to (or deduction from) general language imposing a tax, that the authorities require strict construction of such exceptions, and that accordingly any doubt must be resolved against the taxpayer.

We respectfully submit that the deductions which we claim are not exceptions to language imposing a tax, but are a part of the definition in the taxing act itself, of the subject of taxation, and of the method of computation. The "price" taxed in § 603 is determined and defined only

in § 619. The two sections, of course, came into effect simultaneously. Nothing is a "price" taxable under § 603 unless within the definition in § 619. The net effect is just what it would have been if, following common practice, that definition had been included in a preliminary set of definitions at the beginning of the statute.

Accordingly, the case is within the ordinary rule requiring liberal construction in favor of the taxpayer, and taxing him only when there is no doubt as to the intention of Congress to do so. The rule requiring strict construction, against the taxpayer, of exceptions, is therefore inapplicable.

CONCLUSION

The decision below should be reversed.

December, 1944.

JOSEPH H. CHOATE, JR.,
MAURICE LÉON,
Amici Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 181.—October Term, 1944.

The F. W. Fitch Company, a Corporation, Petitioner. *vs.* United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[January 15, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

Section 603 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 261, Internal Revenue Code § 3401, imposes on toilet preparations sold by manufacturers or producers an excise tax equivalent to stated percentages "of the price for which so sold." Petitioner was subject to this tax from October 1, 1936, to June 30, 1939, and has sought a refund of a portion of the tax paid on the ground that its selling and advertising expenses should have been excluded from the selling prices in computing the tax. The District Court after trial upheld this claim and awarded a refund, 52 F. Supp. 292, but the court below reversed that judgment, 141 F. 2d 380. The alleged conflict with the decisions of the Circuit Court of Appeals for the Seventh Circuit in *Campana Corp.* v. *Harrison*, 114 F. 2d 400, and *Campana Corp* v. *Harrison*, 135 F. 2d 334, led us to grant certiorari.

The controversy here centers about Section 619(a) of the Act, which provides for the inclusion and exclusion of certain items in computing the selling price for purposes of the tax levied by Section 603 as well as various other sections. Section 619(a) states that, in computing the sales price,

"... there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this title, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations."

Petitioner contends that advertising and selling expenses fall within the term "other charge" appearing in the last sentence

of Section 619(a) and hence are excludable in determining the selling price for tax purposes. This claim, however, is refuted by both the spirit and the letter of this statutory provision.

Congress sought in the Revenue Act of 1932 to use the manufacturer's or wholesaler's selling price, rather than the retail price, as the measure of the excise taxes imposed by Section 603. 75 Cong. Rec. 11383, 11657. Section 619(a) was designed to lay down specific rules for determining this selling price, especially in relation to costs incurred after the article itself had been manufactured. It provides for the use of the manufacturer's or producer's f. o. b. price at the factory or place of production. In essence, all manufacturing and other charges incurred prior to the actual shipment of an article and reflected separately or otherwise in the f. o. b. wholesale price are to be included in the sale price underlying the tax, while all charges incurred subsequent thereto are to be excluded. Hence any additional charge which a purchaser would not be required to pay if he accepted delivery of the article at the factory or place of production may be so excluded. See H. Rep. No. 708 (72d Cong., 1st Sess.) p. 37; S. Rep. No. 665, Part 3 (72d Cong., 1st Sess.) p. 3; H. Conf. Rep. No. 1492 (72d Cong., 1st Sess.) p. 22.

Advertising and selling expenses incurred by a manufacturer such as petitioner clearly fall within the class of charges which Congress intended to be included in the tax base. Regardless of whether we consider such expenses technically as manufacturing costs, it is obvious that they are incurred prior to the actual shipment of articles to wholesale purchasers and that they enter into the composition of the wholesale selling price. Even if the purchaser accepts delivery at the factory, he pays for the advertising and selling expenses. Thus they must be included in the taxable sales price.

The inclusion of these expenses is plainly warranted by the language of Section 619(a). Pre-shipment charges relative to coverings, containers and placing an article in condition for shipment are specifically included in the determination of the selling price. But a subsequent "transportation, delivery, insurance, installation, or other charge" is to be excluded if properly established. In the setting of this case, no rule of reason or grammar justifies placing advertising and selling expenses within the meaning of this exclusionary sentence.

To begin with, advertising and selling expenses are obviously not comparable to the specified charges for transportation, delivery,

insurance or installation—all of which are incurred subsequent to the preparation of an article for shipment and are not included in the manufacturer's f. o. b. selling price. Hence advertising and selling expenses cannot be encompassed by the term "other charge" unless that term be taken to include charges entirely dissimilar to those specified. This term, however, was understood by its framers to mean "like charges" or "similar charges" to those specifically enumerated in the same sentence. H. Rep. No. 708 (72d Cong., 1st Sess.) p. 37; S. Rep. No. 665, Part 3 (72d Cong., 1st Sess.) p. 3; H. Conf. Rep. No. 1492 (72d Cong., 1st Sess.) p. 22. When this fact is added to the general intent of Congress to include all costs or charges incurred prior to shipment, the applicability of the *ejusdem generis* rule to the term "other charge" becomes clear. This rule, which appropriately may be invoked here since it does not conflict with the general purpose of the statute, compare *S. E. C.* v. *Joiner Corp.*, 320 U. S. 344, 350, 351, with *Smith* v. *Davis*, 323 U. S. —, limits the "other charge" to expenses similar in character to those incurred for transportation, delivery, insurance and installation. Since advertising and selling expenses arise prior to shipment and are necessarily components of the f. o. b. selling price, the term "other charge" cannot cover them.[1] They must be included in the tax base. Such has been the consistent administrative construction of the statute. G. C. M. 21114, 1939-1 Cum. Bull. 351, 353. And such is the result made necessary by the accepted rules of statutory construction.[2]

It is argued that this conclusion results in a discrimination against a manufacturer who indulges in his own advertising and selling campaigns in favor of one whose products are advertised by his customers and that Congress could not have intended such a discrimination. But this discrimination, to the extent that it

[1] The parenthetical matter following the term "other charge" in the last sentence of Section 619(a)—"(not required by the foregoing sentence to be included)"—is not significant in this case. It serves simply to provide that, to the extent that the provisions for inclusion and exclusion may overlap, the former shall control.

[2] Section 3(a) of the Revenue Act of 1939, 53 Stat. 862, 863, Internal Revenue Code § 3401, excluded from the sale price "a transportation, delivery, insurance, or other charge, *and the wholesaler's salesmen's commissions and costs and expenses of advertising and selling.*" (Italics added.) Section 3(b) made this amendment prospective only and hence Section 3(a) cannot be taken as a Congressional declaration that the advertising and selling expenses were intended to be excluded from the selling price under the Revenue Act of 1932. On the contrary, the very fact that Congress found it necessary in 1939 to exclude such expenses specifically is persuasive evidence that prior thereto advertising and selling expenses were not meant to be excluded.

may exist, is an unavoidable consequence of an excise tax based on the wholesale selling price. Such cost factors as labor, materials and advertising naturally vary among competing manufacturers; different costs and different methods of doing business in turn may cause the wholesale selling prices to lack uniformity. And if these prices are taxed without adjustment for differing cost factors, tax inequalities and discriminations inevitably result. But where, as here, a flat tax is placed on the wholesale selling prices and no statutory provisions are made for relief from the resulting natural tax inequalities, courts are powerless to supply it themselves by imputing to Congress an unexpressed intent to achieve tax uniformity among manufacturers selling at wholesale.[3]

Finally, petitioner urges that Section 619(b) must also be considered in order to ascertain the true Congressional intent and in order to give Section 619(a) its proper construction. But Section 619(b) merely provides that where the manufacturer sells at retail, on consignment or otherwise than through an arm's length transaction, the tax shall be based upon a figure determined by the Commissioner with reference to the prices at which similar articles are sold in the ordinary course of trade. Inasmuch as petitioner's sales were made at wholesale, Section 619(b) has no direct application to this case. But it does serve to emphasize the failure of Congress to make similar provisions for tax equalization under Section 619(a) where the manufacturer's sales are at wholesale. It cannot, however, vary the plain intent and language of Section 619(a) and Congressional statements[4] relating to the desirability of eliminating discriminations against manufacturers making retail sales cannot be taken as evidence of a desire to prevent the natural inequalities that result when a tax is placed on the wholesale selling price.

Affirmed.

Mr. Justice ROBERTS ~~is of opinion that the judgment should be affirmed~~ concurs in the result.

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[3] Congress has subsequently realized that the excise tax on the wholesale selling price created tax inequalities among manufacturers. In Section 552 of the Revenue Act of 1941, 55 Stat. 687, 718, Congress substituted a retail excise tax for the manufacturer's excise tax on toilet preparations. The reasons assigned for the change were that under the earlier law "evasion is substantial and inequitable competitive situations are created." H. Rep. No. 1040 (77th Cong., 1st Sess.), p. 33.

[4] See H. Rep. No. 708 (72d Cong., 1st Sess.), pp. 32-33; 75 Cong. Rec. 5693, 5694.